Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1994

NICHOLAS E. TAVAGLIONE,

Respondent,

v.

MICHAEL C. BILLINGS, MARYANN ARCHAMBAULT, J. RICHARD SWARTZ, ROY E. WHITEHEAD, and RIVERSIDE NATIONAL BANK,

Petitioners.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME 2 OF 3

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APPENDIX B

TAVAGLIONE V. BILLINGS
4 Cal.4th 1150; 17 Cal.Rptr.2d 608; 847 P.2d 574 [Mar. 1993]

[No. S027895. Mar. 25, 1993.]

NICHOLAS E. TAVAGLIONE, Plaintiff and Respondent, v. MICHAEL C. BILLINGS et al., Defendants and Appellants.

SUMMARY

Plaintiff, a corporate shareholder and director, brought an action against the corporation and its officers arising from defendants' removal of plaintiff from the board of directors. Plaintiff alleged seven theories of recovery, including defamation. The jury rendered a general verdict with special interrogatories. The jury awarded plaintiff approximately $2.25 million in compensatory damages, but the jury's responses to special interrogatories disclosed it found plaintiff's damages on the defamation count were $604,787; damages on plaintiff's other theories accounted for the difference. The jury also awarded plaintiff $2.4 million in punitive damages. (Superior Court of Riverside County, No. 187341, John P. Carroll, Judge.) On appeal defendants raised 17 issues affecting each of plaintiff's theories of recovery. The Court of Appeal, Fourth Dist., Div. Two, No. E006746, limited its review to the eight defamation issues, rejected them, and upheld the entire damage award following the "general verdict rule" that a general verdict must be sustained so long as any one count or theory of recovery is supported by substantial evidence.

The Supreme Court reversed the judgment of the Court of Appeal and remanded to that court for resolution of the remaining appellate issues. It held that, since the jury specifically attributed only a fraction of the damages to defamation, reliance on the general verdict rule to limit appellate review was improper, and appellate review of the issues potentially affecting the remainder of the damage award was necessary. (Opinion by Lucas, C. J., with Panelli, Kennard, Arabian, Baxter and George, JJ., concurring. Separate dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1c) **Appellate Review § 160--Disposition of Cause--Affirmance-- General Verdict Rule--Effect of Jury's Responses to Special Interrogatories: Trial § 106--Verdict and Findings of Jury.**--In an action against a corporation and certain of its officers alleging seven theories of recovery, including defamation, arising from plaintiff's removal as corporate director, the Court of Appeal erred in upholding the entire damages award. The jury rendered a general verdict awarding plaintiff approximately $2.25 million in compensatory damages, but the jury's responses to special interrogatories disclosed it found plaintiff's damages on the defamation count were $604,787; damages on plaintiff's other theories accounted for the difference. The Court of Appeal limited its review to defendants' issues relating to defamation, rejected them, and upheld the entire damage award following the "general verdict rule" that a general verdict must be sustained so long as any one count or theory of recovery is supported by substantial evidence. Since the jury specifically attributed only a fraction of the

damages to defamation, reliance on the general verdict rule was improper. Thus, appellate review of the issues potentially affecting the remainder of the damage award was necessary.

[See **Cal.Jur.3d**, Trial, § 123; 7 **Witkin**, Cal. Procedure (3d ed. 1985) Trial, § 331.]

(2) **Appellate Review § 160--Disposition of Cause--Affirmance--General Verdict Rule: Words, Phrases, and Maxims--General Verdict Rule.**--The general verdict rule provides that where several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts. The rule is based on the assumption that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error.

(3) **Damages § 3--Compensatory--Multiple Recovery.**--Regardless of the nature or number of legal theories advanced by a plaintiff, the plaintiff is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his or her damages, whether that amount is expressed by the jury in a single verdict or

multiple verdicts referring to different claims or legal theories.

COUNSEL

Haight, Brown & Bonesteel, Roy G. Weatherup and Rita Gunasekaran for Defendants and Appellants.

Miller, Boyko & Bell, Roy Morrow Bell, Fletcher W. Paddison, Raymond Pepper and Thomas T. Lord for Plaintiff and Respondent.

OPINION

LUCAS, C. J.--In this case, we consider the interplay between the jury's responses to special interrogatories, disclosing the amount of damages attributable to plaintiffs various theories of recovery, and the jury's general verdict, setting forth the total amount of damages awarded to plaintiff. Here, plaintiff sued defendants on several different causes of action, including defamation. The jury's general verdict awarded plaintiff approximately $2.25 million in compensatory damages, but the jury's responses to special interrogatories disclosed it found plaintiff's damages *on the defamation count* were only $604,787; damages on plaintiff's other theories accounted for the difference. The jury also awarded plaintiff $2.4 million in punitive damages.

On appeal, although defendants raised 17 issues affecting each of plaintiffs theories of recovery, the Court of Appeal limited its review to the 8 defamation issues, rejected them, and upheld the entire $2.25 million damage award on the theory that "the judgment must be affirmed so long as any one count or theory of recovery is supported by substantial evidence." Because this analysis fails to properly take into

account the jury's responses to special interrogatories, which limited to $604,787 plaintiff's damages for defamation, we will reverse the judgment and remand the cause to the Court of Appeal for disposition of the remaining appellate issues.

1. *Background Facts*

From time to time, defendant Riverside National Bank (RNB) loaned money to plaintiff, the bank's single largest shareholder and a member of its board of directors. These loans were short-term, interest-only loans, and plaintiff occasionally defaulted on interest payments. In February 1987, RNB's directors met to discuss plaintiff's defaults and the possibility of removing him from the board. The directors adopted a bylaw disqualifying anyone from serving as a director who stood in default to the bank for more than 30 days. Plaintiff, who allegedly had no notice of this special meeting, did not participate in the bylaw's adoption. The board subsequently notified plaintiff that, by reason of his current loan default, he was disqualified from continuing to serve as director.

In March 1987, two news articles appeared which quoted RNB's executive vice-president, defendant Swartz, as saying, among other things, that plaintiff had been "ousted" from the board because of delinquent loans totalling $714,405.

Following his removal from the board, plaintiff agreed with Bank of Hemet to sell his RNB stock to that bank to obtain money to cure existing defaults and repay the loans from RNB. RNB's president, defendant Billings, thereafter wrote to RNB shareholders describing plaintiff's stock sale agreement as "illegal" and "not in the best interests" of RNB.

2. *Plaintiff's Causes of Action*

Based on the foregoing facts, plaintiff sued defendants for damages allegedly incurred by their tortious conduct. We briefly describe the seven causes of action set forth in

plaintiff's complaint, as these allegations are relevant to our inquiry whether the Court of Appeal properly confined its review to the issues surrounding the defamation count.

Plaintiff's first cause of action was based on a theory of "illegal ouster"-- plaintiff asserted he was denied access to board meetings and thus was ousted as a director of RNB and denied his rights as shareholder. Plaintiff alleged the newly adopted bylaw violated section 303 of the Corporations Code, which generally prohibits removal of a corporate director prior to the expiration of his term. He also alleged the bylaw amounted to an unlawful "ex post facto provision" when applied to previously incurred loan defaults.

Plaintiff's second cause of action was based on defamation arising from defendants' publication of the information contained in the foregoing news articles and letter to shareholders. Plaintiff alleged damage to his business and reputation, as well as financial losses resulting from being forced to sell his RNB stock at less than fair market value.

Plaintiff's third cause of action was based on "wrongful disclosure of confidential information" and alleged that defendants breached their obligation of confidentiality by conspiring to disclose plaintiff's loan defaults in order to oust him from the RNB board, damage his credit standing, and force him to sell his RNB stock.

Plaintiff's fourth cause of action was based on defendants' tortious breach of the implied covenant of good faith and fair dealing, and alleged that defendants conspired to use plaintiff's loan defaults as an excuse for ousting him from the RNB board, thereby nullifying his right as a shareholder to elect directors, and forcing him to sell his RNB stock.

Plaintiff's fifth cause of action was based on a theory of intentional interference with plaintiff's contractual relationships with RNB as a shareholder and borrower. Plaintiff

alleged that defendants' wrongful acts of removing him from the RNB board and publishing information regarding his loan defaults improperly interfered with those relationships.

Plaintiff's sixth cause of action was based on "interference with contractual relations and prospective advantage," and alleged that defendant's acts interfered with plaintiff's relations with financial institutions other than RNB.

Plaintiff's seventh and final cause of action was based on negligent interference with plaintiff's relations with financial institutions other than RNB.

As to each of the foregoing causes of action, plaintiff sought compensatory and punitive damages in varying amounts for defendants' alleged tortious conduct.

3. *General Verdict With Special Interrogatories*

At the completion of the 30-day trial, the jury returned in plaintiff's favor a "general verdict with special interrogatories." As will appear, the jury's responses disclose that the jury found plaintiff had been damaged in various amounts on each cause of action.

Among other questions, the verdict form asked the jury whether either defendant RNB or defendant Billings was liable for *removing* plaintiff from RNB's board, and, if so, what was the "total amount" of plaintiff's damages for such removal. All 12 jurors found that both such defendants were liable, and that the total amount of damage was $2,254,787. The form also asked whether either RNB or Billings was liable for *defaming* plaintiff and, if so, what was the "total amount" of damages as a result thereof. By a vote of 11 to 1, the jury found that both these defendants were liable, and that plaintiff suffered defamation damages in the "total amount" of $604,787.

Other responses found defendants RNB and Billings liable for *breaching the implied covenant* of good faith, to

plaintiff' s damage in the "total amount" of $1,650,800; that these defendants and other named defendants were liable for *conspiring* to intentionally interfere with plaintiff's contractual relations with RNB, to plaintiff's damage in the amount of $1,622,000; and that defendants RNB and Billings were liable for *interfering* with plaintiff's contracts or relations with other lenders, to plaintiff's total general damage of $2,226,787. Additionally, the jury rendered a special verdict assessing punitive damages against RNB in the amount of $2.3 million and against Billings in the amount of $130,000.

As a result of the jury's general verdict and interrogatories, the trial court entered its judgment ordering that plaintiff recover (1) from defendant RNB, $2,254,787 in compensatory damages and $2.3 million in punitive damages, for a total of $4,554,787; (2) from defendant Billings, the sum of $2,254,787 in compensatory damages and $130,000 in punitive damages, for a total of $2,384,787; and (3) from three other named defendants, the sum of $1 each (as prayed).

4. *Court of Appeal Opinion*

On appeal, defendants' 119-page opening brief raised 17 contentions relating to each of the foregoing 7 causes of action. Among other contentions, defendants challenged as erroneous or inadequate the jury instructions covering these causes of action, and also disputed the sufficiency of the evidence in support thereof. The Court of Appeal, however, considered and resolved only those issues pertaining to the defamation cause of action, believing application of the "general verdict rule" (discussed below) made it unnecessary to address any other issues.

The Court of Appeal reasoned that its review of the issues was "simplified" by the principle that " 'a complaint may plead different theories on which relief is sought with legal propriety. . . . Where an appeal is taken [from a general verdict] . . . the reviewing court has the power to disregard

particular theories and to affirm the judgment on a theory which is supported by the finding and evidence in order that causes may be disposed of by a single appeal and without further proceedings in the trial court.'. . . (*Crogan v. Metz* (1956) 47 Cal.2d 398, 403 [303 P.2d 1029].) In other words, . . . where as here an appeal is taken from a general verdict returned on several counts or theories of recovery, it is presumed that the jury found in favor of the prevailing party on each count or theory of recovery and the judgment must be affirmed so long as any one count or theory of recovery is supported by substantial evidence. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673 [117 Cal.Rptr. 1, 527 P.2d 353].)" (Fn. omitted.)

The Court of Appeal continued by observing that by reason of the "general verdict rule," it is unnecessary to determine whether every count or theory of recovery is legally valid and supports the general verdict, but only whether any *one* such theory is valid and supports that verdict. As the court stated, "In other words, we must affirm the judgment if we determine there is any theory of recovery which supports the judgment. [Fn. omitted.] This principle pertains even though the measure of damages, and thus the amount of the general damage verdict, might differ under the various theories of recovery pleaded in the complaint. (*Crogan v. Metz* [(1956)] 47 Cal.2d [398] at 404-405 [303 P.2d 1029]; *Gilman v. Nemetz* (1962) 203 Cal.App.2d 81, 94 [21 Cal.Rptr. 317].)"

The Court of Appeal explained that it relied on the jury's responses to interrogatories only insofar as they show "the jury found liability and malice in connection with each theory pursued by plaintiff at trial." The appellate court acknowledged that the jury's responses "attributed varying monetary figures to each theory of recovery," and that "[o]nly the damage amount attributed to the . . . 'illegal ouster' [theory] actually equates to the total general verdict damage

award." Yet the court stated that it was not bound by the jury's allocation of damages for purposes of applying the general verdict rule because "according to the jury instructions, plaintiff was entitled to recover the same amount of damages under any theory alleged and proved at trial."

The Court of Appeal agreed that the responses to interrogatories were useful to test the general verdict as to the issues of liability and malice, but stated that "we are unable to comprehend the function or import of the special interrogatories regarding damages." In the court's view, "we are not constrained by the damage special interrogatories in resolving the issues raised in this appeal because those interrogatories are meaningless and therefore irrelevant. [¶] . . . [W]e conclude . . . that the general verdicts of liability and damage are supported by plaintiff's defamation count. Consequently we need not address each of defendants' 17 claims of error but instead shall limit our review to those claims which relate directly or indirectly to the `cause of action' for defamation."

5. *Discussion*

(1a) As will appear, we disagree with the Court of Appeal's analysis. The jury's responses to the interrogatories clearly disclosed its finding that plaintiff had incurred only $604,787 in compensatory damages from defendants' defamation. The Court of Appeal's limited review and rejection of the defamation issues cannot sustain the entire $2.25 million judgment.

The Court of Appeal's statement that the damage interrogatories were "meaningless and irrelevant" is puzzling. Under section 625 of the Code of Civil Procedure, the trial court is permitted to direct the jury "to find upon particular questions of fact . . . . Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." (See also *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541

[138 Cal.Rptr. 705, 564 P.2d 857] [special verdict or finding primarily used to test validity of general verdict]; *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, 403 [254 Cal.Rptr. 840] [same]; *Bond v. DeWitt* (1954) 126 Cal.App.2d 540, 544 [272 P.2d 561] [special interrogatory response finding no fraud by defendants deemed inconsistent with general verdict awarding plaintiff damages, where fraud only viable cause of action].) Nothing in section 625 or California case law suggests that the section is inapplicable to special findings regarding damages as were made here. (See *Pressler v. Irvine Drugs, Inc.* (1985) 169 Cal.App.3d 1244, 1249 [215 Cal.Rptr. 807] [approving use of special interrogatories to allocate general verdict damages between medical expenses, lost earnings, and general damages].)

(2) The "general verdict rule" relied on by the Court of Appeal provides that where several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts. (See *McCloud v. Roy Riegels Chemicals* (1971) 20 Cal.App.3d 928, 935-936 [97 Cal.Rptr. 910].) The rule is based on the assumption "that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error," an assumption that may be proven incorrect by the special verdict or response to special interrogatories. (Id. at p. 936.)

(1b) Here, the jury's responses to the special interrogatories disclosed its determination that plaintiff was damaged in differing amounts by defendants' tortious activity. Among other responses, the jury found that plaintiff's damages resulting from defendants' defamation amounted to $604,787, those resulting from defendants' breach of the implied covenant totaled $1,650,800, and plaintiff's "total damages" from being removed from the RNB board were $2,254,787. (Inex-

plicably, the two lesser damage figures add to $2,255,587. Perhaps the $1,650,800 figure was intended to be $1,650,000.)

As indicated in the jury's remaining responses, plaintiff was also damaged in the amount of $1,622,000 by defendants' interference with plaintiff's contractual relations with others, but this damage seemingly overlapped damages plaintiff suffered through breach of the implied covenant and was probably included in the $2,254,787 total damage figure. Using the jury's special finding as to defamation damages to "test" the general verdict, it seems incontrovertible that only a portion (namely, $604,787) of the general verdict of $2,254,787 may be deemed to constitute damages attributable to defendants' defamation.

Plaintiff contends that defendants waived the right to assert any inconsistency between the responses to special interrogatories and the general verdict. According to plaintiff, defendants agreed to the form of the verdict, declined to request resubmission of any issues to the jury, and failed to raise the supposed inconsistency in their postjudgment motions.

We think plaintiff misconceives the precise nature of the inquiry before us. Our present task is not to reconcile the various responses to the special interrogatories with the general verdict, but to determine whether the Court of Appeal properly affirmed a judgment for $2,254,787 in compensatory damages and $2.3 million in punitive damages by reviewing only those issues pertaining to a $604,787 component of that judgment. Even assuming defendants waived their right to object to the verdict form or to assert inconsistencies in the verdict, the fact remains that the jury specifically found defendants' defamation of plaintiff amounted to only a fraction of the total damages suffered by him. Thus, some appellate issues potentially affecting the remainder of these damages have not been reviewed, including substantial issues underly-

ing plaintiff's theory of illegal ouster. (Defendants' opening brief on appeal appears to contain numerous issues pertinent to causes of action other than the defamation cause.) We conclude that, under such circumstances, reliance on the general verdict rule to limit review of the issues was improper.

The Court of Appeal's reliance on *Crogan v. Metz* (1956) 47 Cal.2d 398, 404-405 [303 P.2d 1029], and *Gilman v. Nemetz* (1962) 203 Cal.App.2d 81, 94 [21 Cal.Rptr. 317], seems misplaced. These cases allow application of the general verdict rule despite variances in the measure and amount of damages under the various theories of recovery. Neither *Crogan* nor *Gilman*, however, involved special findings which assigned specific damage amounts to specific theories of recovery. Neither case suggests that the general verdict rule would apply despite such special findings.

As for the Court of Appeal's statement that under the instructions plaintiff was entitled to recover the same amount of damages under any of plaintiff's various theories, we have reviewed the instructions and none of them would preclude a finding of differing amounts of damage for each theory of recovery. Indeed, as a matter of logic, it would seem unlikely that plaintiff's damages from being *defamed* by defendants would be identical to the damages he incurred from being *ousted* from RNB's board of directors. Unlike the cases cited by plaintiff (e.g., *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1182 [272 Cal.Rptr. 304]), these theories of recovery seem based on different "primary" rights and duties of the parties.

(3) Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. (*Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 291 [272 P.2d 82].) Double or

duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. (*Ibid.*)

Thus, for example, in a case in which the plaintiff's only item of damage was loss of commissions, two awards of damages identical in amount--one for breach of contract and the other for bad faith denial of the same contract--could not be added together in computing the judgment. Plaintiff was entitled to only one of the awards. (*DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 563-565 [282 Cal.Rptr. 181]; see also *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 995-996 [149 Cal.Rptr. 119] [impermissible double recovery where no separate evidence supported distinct awards of damages in contract and tort].)

In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories. (See *Pat Rose Associates v. Coombe* (1990) 225 Cal.App.3d 9, 20 [275 Cal.Rptr. 1], disapproved on other grounds in *Adams v. Murakami* (1991) 54 Cal.3d 105, 116 [284 Cal.Rptr. 318, 813 P.2d 1348] [recovery of sum of (1) out-of-pocket loss recovered under fraud theory and (2) lost profits damages recovered under contract theory permissible where damage items were distinct and entire amount of injury was compensable under fraud theory in any event].)

(Ic) Because the Court of Appeal herein misapplied the general verdict rule, it did not review the jury's responses to the special interrogatories (other than those involving the defamation claim) to determine whether: (1) they were free from prejudicial error, (2) they were supported by substantial evidence, and (3) they were based on separate items of

compensable damage so as to justify aggregating them in computing the total amount of the judgment. In order to sustain the judgment against defendants in the stated amount, the Court of Appeal was required to review and uphold a sufficient number of separate damage findings which, when combined, equalled or exceeded the amount of the judgment. This review was not undertaken.

In response to the dissent herein, we note that although the Court of Appeal mentioned the procedural concerns cited by the dissent, the court nonetheless elected to reach the merits of the defamation issues raised on appeal. On remand, the Court of Appeal will be free to dispose of the remaining appellate issues on whatever grounds, procedural or substantive, that court deems appropriate.

The judgment of the Court of Appeal is reversed and the cause is remanded to that court for resolution of the remaining appellate issues.

Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J.--I dissent for procedural reasons.

First, we should not have granted review of this case. The California Rules of Court give us the discretionary authority to grant review only when "it appears necessary to secure uniformity of decision or the settlement of important questions of law . . . ." (Cal. Rules of Court, rule 29(a)(1).) This case meets neither criterion. Indeed, though I concede its importance to the parties, its public significance is minimal. As the majority opinion illustrates, whatever errors of law the Court of Appeal may have committed in its unpublished opinion, there are both statutes and published case law on point. (See maj. opn., *ante*, pp. 1156-1157.)

Second, having granted review, we should not reach the result the majority do. This case should not be remanded

to the Court of Appeal to address the remaining issues. Rather, because the remaining issues appear to be defectively presented on appeal, the Court of Appeal's judgment should be affirmed. The case's chronology indicates that defendants failed to meet the requirements of the appellate court.

Ordinarily a party to civil litigation may not file a printed brief on appeal longer than 40 pages. (Cal. Rules of Court, rule 15(e); cf. *id.*, rule 37(c) [criminal cases].) Defendants moved to file an opening brief of approximately 120 typewritten pages, which they represented to be the equivalent of about 80 printed pages. The Court of Appeal accommodated defendants' request over plaintiff's opposition.[1]

Defendants then filed an opening brief that, according to plaintiff, was not 80 printed pages long, but 109.[2]

The Court of Appeal found that brief unsatisfactory. The court ordered defendants to annotate it because "citations to the record are not included to support factual and procedural matters contained in the Argument sections, pages 40 through 108."

Thereupon defendants filed their corrected opening brief. That brief, which the record does contain, is 119 pages

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[1] Plaintiff correctly observed that "it is harder to write a shorter brief than . . . a longer brief" but that, absent the court rules' limits on the length of briefs "the court would be burdened with briefs [that are lengthy, repetitive and contain unnecessary verbiage."

[2] I rely on plaintiff's description of the length of defendants' original opening brief, because for reasons that will appear, the record on appeal does not contain it.

In a request for modification, defendants now declare they obtained by telephone the court clerk's permission to file a brief of this size.

long. It is densely composed in what appears to be a 12-point times roman font on 14-point lines.

Remarkably, despite the new brief's density and length, the Court of Appeal found that it still failed to include sufficient references to the record. The court's irritation turned to wrath. In its opinion the court declared it proper to "reduce the issues we must address in this appeal" because of "defendants' near-total failure to demonstrate that the issues asserted on appeal first were raised by defendants in the trial court. In other words, because the 'party challenging a judgment has the burden of showing reversible error by an adequate record' [citation] defendants' claims of error must include appropriate citations to the record showing where the purported error occurred, and if appropriate, that defendants objected to that error in the proceeding below. Defendants, by failing in their opening and reply briefs to provide anything other than cursory citations to the joint appendix in lieu of clerk's transcript or to the reporter's transcript, have failed, almost without exception, to demonstrate [that] error occurred in the trial court. In failing adequately to cite the record, defendants either misperceive the function of appellate review [footnote omitted] or would have us assume the purported error was raised somewhere in the trial court and can be found by reviewing the voluminous joint appendix and reporter's transcript. . . .

"Defendants' oversight would be troublesome in a case which involved only a relatively small trial court record. The record, here, however, is formidable . . . . Assuming defendants were aware of their burden on appeal to demonstrate that defendants complained of the purported error in the trial court, we can only interpret defendants' failure to include appropriate citations to the record as an implicit invitation to this court to ferret out the error ourselves. We decline defendants' invitation."

The Court of Appeal was correct. "An appellate court is not required to search the record to determine whether or not [it] supports appellants' claim of error. It is the duty of counsel to refer the reviewing court to the portions of the record which support appellants' position." (*Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835 [115 Cal.Rptr. 685]; see Cal. Rules of Court, rule 15(a).)

Like the majority, I believe the Court of Appeal is entitled on remand to resolve the remaining issues on procedural grounds to the extent the law permits.

Specifically: if defendants did not raise claims of instructional error in the trial court those claims may be waived, depending on whether the asserted error was one of law and plain on the instruction's face, or rather one of omission (i.e., incompleteness) or excessive generality. (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 333-334 [5 Cal.Rptr.2d 594], quoting *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948-949 [160 Cal.Rptr. 141, 603 P.2d 58]; *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1010 [283 Cal.Rptr. 644].) In the case of a purported omission, the claim of instructional error is not preserved for appeal unless defendants can show they offered and were refused an alternative instruction that would have cured the asserted defect. (See *Weller v. American Broadcasting Companies, Inc., supra*, 232 Cal.App.3d at p. 1010.)

And if defendants did not raise objections to evidentiary rulings on the grounds urged on appeal as constituting the basis for error, they have waived those claims. "Failure to make a timely objection or motion to strike inadmissible evidence constitutes a waiver of the right to later complain of its erroneous admission .... [Citation.] Parties also waive the right to later contest the admissibility of evidence where counsel fails to state the specific, correct ground or grounds

supporting the objection. [Citation.]" (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 865 [236 Cal.Rptr. 778].)

Given the foregoing rules, I believe it elementary that defendants were required to explain where in the record they made their objections or, in the case of a plainly erroneous instruction, where the record shows that the error complained of was plain and not one of omission under the facts of the case. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [224 Cal.Rptr. 664, 715 P.2d 624] [plur. opn.].) The Court of Appeal is not required on remand to resolve these remaining issues on the merits if to do so means it must scour through this case's voluminous record to locate the relevant proceedings itself. (*Green v. City of Los Angeles, supra*, 40 Cal.App.3d 819, 835.)

I decline to finely parse defendants' 119-page densely printed corrected opening brief or their similarly formatted 40-page reply brief in the Court of Appeal to discover the full extent to which they did or did not support their claims of error with adequate references to the record. I believe the Court of Appeal's determination that defendants' briefing was inadequate, even after the court accommodated them by permitting corrections, deserves our deference.

Accordingly, I cannot sign the majority opinion. My decision not to do so should not be interpreted as a reflection on the merits of the majority opinion's general discussion of the relevance on appeal of special findings on damages. (Maj. opn., *ante*, pp. 1156-1157.) I merely object to the application of those principles, correct or not, to a case with the procedural posture of this one. We should dispose of the case in plaintiff's favor on procedural grounds.

On April 28, 1993, the opinion was modified to read as printed above.

APPENDIX C

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

NICHOLAS E. TAVAGLIONE, Plaintiff and Respondent,	)	E006746
v.	)	(Super.Ct.No. R-187341)
MICHAEL C. BILLINGS, et al.,	)	
	)	**O P I N I O N**
Defendants and Appellants.	)	
	)	

APPEAL from the Superior Court of Riverside County. John P. Carroll, Judge. Affirmed.

Haight, Brown & Bonesteel, Roy G. Weatherup and Rita Gunasekaran for Defendants and Appellants.

Miller, Boyko and Bell, Roy Morrow Bell and Fletcher W. Paddison for Plaintiff and Respondent.

Michael C. Billings, Maryann Archambault, J. Richard Swartz, Roy E. Whitehead, and Riverside National Bank, defendants and appellants (hereinafter collectively referred to as defendants) appeal from the judgment in favor of Nicholas Tavaglione, plaintiff and respondent (hereinafter, plaintiff) entered following a lengthy jury trial, prosecuted by plaintiff on various tort theories of recovery, in which the jury returned a general verdict awarding plaintiff compensatory damages of

$2,254,787 against all defendants, jointly and severally, and further awarding punitive damages of $130,000 against defendant Billings and $2,300,000 against defendant Riverside National Bank.[1]

Defendants, in pursuing this appeal, raise numerous and extensive claims of error in their 119-page opening brief.[2] We conclude, as we shall explain, because the jury returned general verdicts both as to liability and damages, we need not address each of defendants' numerous and various challenges to the theories of recovery pursued by plaintiff, but instead need determine only whether any theory of recovery supports the general verdict. We further conclude, as we also shall explain, that with respect to the remaining issues raised by defendants in this appeal, defendants, with only minor exceptions, have not met their burden to demonstrate error occurred in the trial court. We shall, therefore, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying this appeal essentially are not in dispute.[3] The board of directors of Riverside National Bank

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[1] In accordance with the instructions contained in the "General Verdict with Special Interrogatories" submitted by the parties (discussed, in detail, below) the jury allocated the compensatory damage award among the various defendants. The trial court, recognizing liability of the defendants was joint and several corrected the verdict, accordingly.

[2] All references to defendants' opening brief are to the "Corrected" opening brief filed by defendants on February 28, 1992, in response to our order dated January 31, 1992, advising defendants of their failure to include citations to the record as required by rule 15(a) of the California Rules of Court.

[3] In view of the voluminous record on appeal, consisting of 13 volumes of Joint Appendix in Lieu of Clerk'~ Transcript and 16 volumes

(continued...)

("RNB"), of which plaintiff and the individually named defendants were members, adopted a bylaw at a special board meeting held February 26, 1987, which disqualified anyone in default for more than 30 days on a loan from any financial institution from serving on the board of director.[4] Under the terms of the bylaw, if the default for more than 30 days occurred during the term of a director, that director "shall be disqualified to continue to serve as a director . . . and such person shall be deemed to have vacated his place on the Board of Directors as of the date" of the 30-day default, however, the disqualified director "may be considered for appointment as a director at a future date which is at least one year after the default which gave rise to such disqualification has been cured."

Plaintiff, the single largest shareholder of RNB and an elected member of the board of directors since 1974, had loans from RNB which purportedly were in default for more than 30 days as of the date the board adopted the bylaw. Plaintiff allegedly was not given notice of the special meeting at which the bylaw was amended (see fn. 4, below) and, therefore, apparently was not present and did not participate in that action of the board. Pursuant to the newly adopted bylaw, the board of directors notified plaintiff, by certified letter dated February 26, 1987, that plaintiff did not meet the newly

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[3](...continued)
of Reporter's Transcripts, and because, as above noted, the underlying facts essentially are not disputed, we take our statement of facts from plaintiff's First Amended Complaint.

[4] The board of directors originally adopted the bylaw at a regularly scheduled monthly board meeting held February 18, 1987. Because of a perceived ambiguity in the language of the bylaw as initially adopted, which arguably created a 30-day period in which to cure a default, the board held a special meeting on February 25, 1987, to amend the bylaw and eliminate the purportedly ambiguous language.

adopted qualifications for board members. Therefore, the board advised plaintiff that he was disqualified to continue to serve as a directors and was "deemed to have vacated his place on the Board of Directors as of February 26, 1987."

Thereafter, in March of 1987, two articles pertaining to the board' action appeared in the local newspaper. One such article, which quoted defendant Swartz, identified in the article as RNB's executive vice president, stated, among other things, that plaintiff "was ousted from the Bank's board in late February after board members voted to remove any director who fell behind on loan payments to RNB. At the time, [plaintiff] had delinquent loans at the Bank totalling $714,405.00 according to Bank documents."[5] According to Swartz, "only plaintiff's] loan delinquencies triggered [plaintiff's] ouster" and the Board decided to change [RNB's] bylaws in February to prevent a Director who fell behind in loans from staying on the Board. Although the change resulted from [plaintiff] loans, it was not aimed at [plaintiff] alone . . . ."

At about this same time, and after his removal from the RNB board of directors, plaintiff entered into an agreement to sell his shares in RNB to Bank of Hemet (also referred to as Hemet BanCorp), allegedly for the purpose of obtaining funds necessary "to cure existing defaults and pay off certain loans" from RNB. In April 1987 defendant Billings[6] wrote a letter to RNB shareholders describing plaintiff's agreement

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[5] The "bank document" was an apparent reference to the proxy statement prepared by RNB under the signature of defendant Billings as president in anticipation of the annual shareholders meeting then scheduled for April 15, 1987.

[6] Defendant Billings not only was a board member but also was president of the bank.

with Bank of Hemet as "illegal" and "not in the best interests of" RNB.

Based on the foregoing events, plaintiff sued defendants for damages plaintiff allegedly suffered as the result of the board's various actions. Defendants' demurred to plaintiff's original complaint and after the trial court apparently sustained that demurrer while granting plaintiff leave to amend, plaintiff filed his "First Amended Complaint for Illegal Ouster of Plaintiff as a Director; Invasion of Privacy; Breach of the Covenant of Good Faith and Fair Dealing; Defamation; and Interference with Contractual Relationships.[7]

In his first cause of action for "Illegal Ouster," plaintiff alleged the bylaw adopted by defendants on February 26, 1987, violated California Corporations Code section 303 which, according to the allegations of the complaint, prohibits removal of a corporate director prior to expiration of the director's term except under certain specified circumstances, none of which pertained to plaintiff. Consequently, plaintiff alleged the board's action was unlawful and constituted an illegal "ouster" of plaintiff from the board of director. Additionally, plaintiff alleged the bylaw, by its express language, applied only to directors in default for more than 30 days after adoption of the bylaw. In immediately applying the bylaw to plaintiff, without the 30-day period, plaintiff alleged the board not only improperly adopted "an ex post facto provision," but also did not fairly apply the bylaw provision to other directors "similarly situated."

Relying on the foregoing allegations, plaintiff alleged he was denied access to board meetings and "other rights and privileges as a director of the corporation." In addition, plaintiff alleged, as a shareholder of the corporation, "that

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[7] All further references to the complaint are to plaintiff's First Amended Complaint, as identified, above.

plaintiff has been denied representation on the Bank's board." Consequently, plaintiff alleged, "As a direct and proximate cause of the illegal action of defendants, and each of them, plaintiff has been illegally ousted as a director of the corporation and denied his rights as a shareholder. Plaintiff has sustained damages in an amount to be proven at trial."

In his second cause of action for defamation, plaintiff sought compensatory damages of Sl. 5 million and $3 million in punitive damages based upon defendants' publication of the information contained in the newspaper articles, as set forth above, as well as in the proxy statement and Billings' April 1987 letter to RNB's shareholders. In addition to seeking special damages based upon alleged injury to plaintiff Business as a contractor and real estate developer, plaintiff sought general damages for injury to plaintiff's reputation in the community and plaintiff's "credit and reputation with institutional lenders." Plaintiff further alleged, "As a direct and proximate result of defendants' actions, plaintiff has been forced to sell his stock in Riverside National Bank at book value, which is an amount far less than the actual fair market value of the stock."

Plaintiff's third cause of action, entitled "Wrongful Disclosure of Confidential Information," alleged plaintiff, as a depositor and loan customer of RNB, "reposed trust and confidence in the Bank to maintain [plaintiff's] financial privacy and confidentiality of his loan transactions and records. n According to plaintiff, "Defendants, and each of them, had a duty to maintain the confidentiality and privacy of plaintiff's loan accounts with the Bank." Plaintiff further alleged, "As of February, 1987, plaintiff, or his companies, had been in default under the terms and provisions of the various loans with the Bank. In February, 1987 defendants conspired amongst each other and agreed upon a plan to utilize plaintiff's loan defaults as a pretense for ousting

plaintiff from the board of directors and thereafter publicizing plaintiff's ouster and his loan defaults in order to damage plaintiff's credit standing and thereby force plaintiff to sell his shareholders [sic] in the Bank."

Plaintiff also alleged, defendants, in furtherance of the conspiracy, adopted the bylaw, ousting plaintiff from the board of directors, and published information, both in the newspaper, as set forth above, and in the proxy statement sent to shareholders, disclosing the fact and amount of plaintiff's loan defaults. "The publication and disclosure of plaintiff's loan information violated defendants' duty to maintain the privacy and confidentiality of the statements." Plaintiff contended, "As a direct and proximate result of defendants' actions, plaintiff has been required to sell off his shares in the Bank at less than fair market value and has incurred damages in the total amount of $1.5 million." Additionally, plaintiff sought punitive damages in the amount of $3 million.

In his fourth cause of action for tortious breach of the implied covenant of good faith and fair dealing, plaintiff alleged that his status as a loan customer of RNB created a duty on the part of defendants "to deal fairly and in good faith with plaintiff in connection with his loan transactions with the Bank. Defendants had the further duty to deal fairly and in good faith with plaintiff as a shareholder in the Bank to preserve and protect plaintiff's rights as a shareholder. n Plaintiff further alleged defendants "breached the implied covenant of good faith and fair dealing by: [¶] (a) Formulating a plan and conspiracy to utilize plaintiff's loan defaults as the pretext for removing plaintiff from the board; [¶] (b) Improperly removing plaintiff as a director of the corporation in violation of Corporations Code §303(c) and thereby nullifying plaintiff's rights as a shareholder to elect directors; [¶] (c) Failing to give plaintiff an opportunity to cure his loan defaults prior to the adoption of the bylaw; [¶] (d) Utilizing

plaintiff's illegal ouster from the board as a pretense for subsequently publishing confidential and private information concerning plaintiff's loan accounts with the Bank and the defaults under these loans; and [¶] (e) Formulating and implementing this plan to force plaintiff into selling his shareholdings in the Bank."

According to plaintiff, "As a direct and proximate cause of defendants' actions, plaintiff was held up to public contempt and ridicule, plaintiff's credit relationship with the Bank was jeopardized, plaintiff's credit relations with other banks and lending institutions was [sic] adversely affected and plaintiff was forced to sell his shareholdings in the Bank in order to pay off or otherwise cure plaintiff's credit obligations to the Bank and other lending instructions [sic]." Relying on the foregoing allegations, plaintiff sought general damages of $1.5 million for the loss he allegedly incurred in selling his stock in RNB at less than fair market value and further sought punitive damages of $3 million.

Plaintiff's fifth cause of action purported to seek compensatory and punitive damages of $1.5 million and $3 million, respectively, on the tort theory of intentional interference with plaintiff's contractual relationships with RNB based upon plaintiff's status as a shareholder and borrower. In this cause of action, plaintiff alleged defendants knew of plaintiff's contractual relationships with RNB as both a shareholder and borrower and defendants intended, by their actions in removing plaintiff from the board and in publishing information regarding plaintiff's loan defaults, to interfere with plaintiff's ongoing business and economic relationships with RNB.

In his sixth cause of action, entitled "Interference with Contractual Relations and Prospective Advantage," plaintiff alleged defendants knew plaintiff had established banking and lending relationships with financial institutions other than RNB and intended, by "expelling" plaintiff from the board of

directors and publishing information regarding plaintiff's loan defaults, to interfere with plaintiff's other financial relationships. In this cause of action, plaintiff alleged entitlement to compensatory damages of $1.5 million allegedly incurred by plaintiff, as the direct and proximate result of defendants' actions, in paying off loans and curing loan defaults with these other financial institutions. Plaintiff also alleged entitlement to $3 million in punitive damages.

As his seventh and final cause of action, plaintiff alleged the actions of defendants, as set forth in the sixth cause of action, alternatively constituted negligent interference with plaintiff's contractual relationships with other financial institutions. Consequently, plaintiff alleged, "As a direct and proximate result of defendants' actions, plaintiff's banking relationships with the other lenders was [sic] disrupted, plaintiff was refused further extensions of credit, and plaintiff has been required to pay off loans with certain lenders and cure defaults on other loans with various lenders. As a direct and proximate result of defendants' actions, plaintiff has sustained damages in the amount of $1,500,000.00."

After the trial court overruled defendants' demurrer to plaintiff's amended pleading, defendants responded to the first amended complaint by filing an answer in the form of a general denial pursuant to Code of Civil Procedure section 431.30, subdivision (d). In their answer, defendants asserted 12 affirmative defenses which not only included the standard allegations (e.g., failure to state a cause of action, insufficient facts to support an award of punitive damages, estoppel, unclean hands, and failure to mitigate damages) but also included specific affirmative allegations, the details of which shall be discussed, as pertinent, below.

Ultimately, and after extensive pretrial proceedings none of which are pertinent to the issues raised in this appeal, the parties proceeded to a jury trial on each "cause of action"

of plaintiff's first amended complaint. In view of our revolution of the issues raised in this appeal, we need not recount in detail the evidence presented by plaintiff and defendants during the lengthy jury trial. Summarized briefly, plaintiff offered evidence to show that during 1986 he obtained a series of short-term, interest only loans from RNB. Each loan was fully secured and approved by defendant Billings. During 1986, the year immediately preceding the board's adoption of the bylaw pertaining to loan defaults by board members, plaintiff occasionally fell behind on monthly or quarterly interest payments on the four loans then outstanding. According to established procedure, defendant Billings routinely extended the due date for payment of the principal balance on plaintiff loans on condition only that plaintiff was current on interest payments at the time the extension was requested. Plaintiff offered his canceled checks to show plaintiff paid all interest payments due during 1986, although some of those payments arguably were late. Plaintiff also offered evidence, specifically RNB's own records, to show that RNB, apparently due to an error, did not credit plaintiff with a $4,000 loan payment plaintiff made in March 1986. Once RNB credited that $4,000 payment, plaintiff was not in default and, in fact, was current on all interest payments up through January 18, 1987. Therefore, according to plaintiff's evidence, as of February 18, 1987, when the board initially adopted the bylaw which removed plaintiff from the board of directors, plaintiff was 30 days in default on only one loan and that default occurred because defendant Billings refused to extend or renew that loan.

Plaintiff also offered evidence to show that defendants Swartz, Whitehead, Archambault and Billings met on February 4, 1987, apparently at Billings' request, in what plaintiff described as a "secret meeting" to discuss plaintiff's purported loan defaults and removal from the RNB board of directors. At that meeting, defendant Billings presented a written

summary, which Billings apparently specially prepared, of plaintiff's purported loan defaults.[8] At the February 18, 1987, board meeting, the board adopted the bylaw without discussion. Thereafter, and as above noted, the board held a special meeting on February 26, 1987, for purposes of amending the bylaw to eliminate a purported ambiguity which arguably created a 30-day period in which to cure a default. Plaintiff also presented evidence to show that at the time the board adopted the bylaw in February 1987 and later in March 1987 defendant Whitehead was in default by more than 30 days on loans from RNB and Bank of America, respectively, but RNB did not invoke the bylaw to remove Whitehead from the board of directors.

In their defense, defendants offered evidence to support their position that the board adopted the bylaw only after consultation with legal counsel and out of concern for the fiscal well-being of RNB in view of plaintiff's repeated and serious loan defaults. In other words, defendants' evidence was directed at showing the board action in adopting the bylaw was lawful and not directed solely at plaintiff. Defendant Billings testified, in part, that the bylaw was not invoked against defendant Whitehead, at least with respect to Whitehead's RNB loan, because Whitehead had the ability to repay his obligations. Therefore, Billings, as president of RNB, determined although the loan was more than 30 days overdue, Whitehead was not in default. Additional evidence presented by plaintiff and defendants at trial will be discussed, as pertinent, below.

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[8] Billings' summary of plaintiff's purported loan defaults was not produced during either pretrial discovery or trial, although plaintiff apparently requested production of that document. Plaintiff suggests the summary was destroyed, but the portions of the record cited by plaintiff do not support that suggestion.

At the completion of the 30-day trial, the jury returned a purported "general verdict with special interrogatories," awarding plaintiff $2,254,787 in compensatory damages and further finding liability in favor of plaintiff and against defendants on each purported theory of recovery alleged in plaintiff's complaint. After determining liability, and in a separate proceeding, the jury also awarded plaintiff punitive damages of $2,300,000 against RNB and $130,000 against defendant Billings.

Not surprisingly, defendants moved both for judgment notwithstanding the verdict and for new trial while plaintiff, in turn, sought to recover his costs and also, pursuant to Code of Civil Procedure section 1021.1, plaintiff's attorneys' fees. The trial court denied both of defendants' post-trial motions and awarded plaintiff costs and $254,673 in attorneys' fees.

DISCUSSION

Defendants, as noted above, raise numerous issues in pursuing this appeal. More particularly, defendants' first seven issues challenge the various purported causes of action asserted by plaintiff on the grounds that such causes of action either are not viable theories of recovery, as matters of law, or that the evidence presented at trial was insufficient to prove such causes of action. Next, defendants raise various errors purportedly committed during trial by the trial court regarding jury instructions and evidentiary rulings. Defendants' third group of issues are directed at challenging the jury's compensatory and punitive damage awards on the grounds of excessiveness, insufficiency of the evidence and unlawfulness. Defendants further contend the trial court erred in granting plaintiff's motion, pursuant to Code of Civil Procedure section 1021.1, for attorneys' fees. Finally, defendants contend the trial judge was biased in favor of plaintiff such that the "demeanor and conduct" of the trial judge, combined with the "erroneous

and prejudicial evidentiary rulings," deprived defendants of their right to a fair trial.

Our review of the various and extensive issues raised by defendants in this appeal is guided, and ultimately simplified, by the "well established [principle] that a complaint may plead different theories on which relief is sought with legal propriety. [Citations.] It is noted that here each of the counts is based upon the same allegations of fact and that there are no contradictory or antagonistic facts. [Citations.] If the plaintiff makes no election or is not otherwise estopped [citation] the election as to which cause of action is sustained is, after the taking of all the evidence, a matter for the judge or the jury. [Citation.] Where an appeal is taken from such a judgment the reviewing court has the power to disregard particular theories and findings and to affirm the judgment on a theory which is supported by the finding and evidence in order that causes may be disposed of by a single appeal and without further proceedings in the trial court. [Citations.] (Crogan v. Metz (1956) 47 Cal.2d 398, 403.) In other words, and as plaintiff points out, where as here an appeal is taken from a general verdict returned on several counts or theories of recovery, it is presumed that the jury found in favor of the prevailing party on each count or theory of recovery and the judgment must be affirmed so long as any one count or theory of recovery is supported by substantial evidence. (Henderson v. Harnischfeaer Corp. (1974) 12 Cal.3d 663, 673.)[9]

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[9] Although plaintiff, in his brief, alerted defendants to this potentially dispositive issue, defendants did not address the significance of the general verdict in their reply brief, instead apparently choosing to ignore the problem. Because plaintiff raised the issue, and we rely heavily on it in our resolution of the various contentions raised in this appeal, we are not required to afford defendants an additional opportunity to brief the significance of the general verdict.

According to the foregoing principles, it is not necessary for us to determine, as defendants implicitly contend, whether every count or theory of recovery prosecuted by plaintiff is legally valid and supports the jury's general verdicts of liability and damages. Instead, we need only determine whether any theory of recovery does so. In other words, we must affirm the judgment if we determine there is any theory of recovery which supports the judgment.[10] This principle pertains even though the measure of damages, and thus the amount of the general damage verdict, might differ under the various theories of recovery pleaded in the complaint. (Grogan v. Metz, supra, 47 Cal.2d at 404-405; Gilman v. Nemetz 91962) 203 Cal.App.2d 81, 94.)

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[10] During oral argument, defendants acknowledged the significance and effect of a general verdict but asserted such effect does not apply where, as here, instructional error has occurred. Moreover, defendants further claimed during oral argument that they pointed out this exception to the "rule" regarding general verdicts in their opening brief at pages 49 through 50 as evidenced by their citation to Seaman's Direct Buying Service, Inc. v. Standard Oil Co., (1984) 36 Cal.3d 752, for principle that, "'If it appears that error in giving an improper instruction was likely to mislead the jury and thus to become a factor in its verdict, it is prejudicial and ground for reversal.'" (Id. at p. 767.) Both of defendants' assertions, in our view, are disingenuous absent a showing by defendants that improper instructions were given which were likely to mislead the jury with respect to each of the theories of recovery alleged in plaintiff's complaint and pursued at trial. In this respect, defendant citation to Seaman's is particularly telling because that citation occurred in the specific context of defendants addressing instructional error in connection with the first cause of action for "illegal ouster." Although defendants argued such error affected each of plaintiff's theories of recovery because "plaintiff" other causes of action all flow from this central allegation of `illegal ouster,'" defendants' failed to demonstrate that such, in fact, was the case. We conclude, as we shall discuss, plaintiff's defamation theory of recovery was unaffected by any claimed instructional error and thus supports the general verdict.

Our task in this regard is made easier by the jury's responses to the special interrogatories included with the general verdict form. Those responses reveal the jury found defendants liable to plaintiff under each theory of recovery plaintiff alleged in his complaint and pursued at trial and further found in connection with each theory of recovery that defendants RNB and Billings acted with malice. Consequently, the foregoing special interrogatories enable us to avoid the detailed analysis required when the jury returns only a general verdict on various theories of recovery. We know, from the foregoing responses, that the jury found liability and malice in connection with each theory pursued by plaintiff at trial.

The remaining special interrogatories included with the general verdict asked the jury to find . . . the total amount of damages suffered by plaintiffs in connection with each theory of recovery. The general verdict form also instructed the jury, "In totaling compensatory damages, you may (or may not) find that plaintiff is entitled to the same damages under separate theories of recovery. Set forth all of the damages under each subpart on pages 4 through 8. In totaling any damagessto awarded on page 3[the damage general verdict] total all such damages but do not add any specific element of damages more than once." In responding to the purported special interrogatories regarding damages, the jury attributed varying monetary figures to each theory of recovery. Only the damage amount attributed to the first "cause of action" for "illegal ouster" actually equates to the total general verdict damage award.

"The purpose of special interrogatories is . . . . to test the validity of the general verdict by determining whether all of the facts essential to the support of the general verdict were established to the satisfaction of the jury." (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 323, p. 324.) While the special interrogatories regarding liability and malice clearly serve this function, the interrogatories" pertaining to damages

do not. In fact, we are unable to comprehend the function or import of the special interrogatories regarding damage. Possible explanations for these interrogatories are: (1) the parties assumed each theory of recovery pursued by plaintiff constituted a separate cause of action entitling plaintiff to independent recovery; (2) certain of plaintiff's claimed injuries were compensable under some but not all theories of recovery; and/or (3) the parties wanted to ensure the jury did not compensate plaintiff more than once for any claimed item or "element" of damage.[11]

With respect to the first possible explanation, plaintiff's complaint, in our view, did not allege separate causes of action which would independently support separate damage awards but instead alleged one cause of action, framed in separate counts, asserting various theories of recovery based upon the same operative facts. (See Barrett v. Superior Court (1990) 222 Cal.App.3d 1176, 1181-1182.) Moreover, it appears the parties did not propound the special interrogatories for the purpose of identifying damage suffered by plaintiff under separate causes of action. If that had been the parties' objective, and therefore the purpose of the special interrogatories in question, the verdict form would have instructed the jury to total all damages awarded under each cause of action in arriving at their ultimate general damage verdict. In other words, plaintiff would be entitled to recover an amount significantly greater than that actually awarded by the jury.

With respect to the second possible explanation, the jury was instructed that the measure of damage under each theory of recovery was the same, i.e., all damage proximately (or legally) caused by defendants' wrongful acts. The jury was

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[11] The record reveals plaintiff prepared the general verdict with special interrogatories and defendants "agreed" the form was "correct". Therefore, defendants have waived any claim of error in this connection.

not instructed that certain items (or to use the parties' term, "elements") of damage were recoverable under some but not all causes of action. Equally significant is the fact that the parties did not define the term "element of damage" for the jury. In other words, according to the jury instructions, plaintiff was entitled to recover the same amount of damages under any theory alleged and proved at trial.

The third possible explanation appears the most likely. However, this explanation does not comport with the fact-finding function of special interrogatories, as noted above. If the parties wanted to ensure plaintiff did not receive double recovery for any item or element of damage, a simple instruction to that effect would have sufficed.

Consequently, and for each of the foregoing reasons, we conclude the special interrogatories on damages serve no readily identifiable, proper function in that they do not test the validity of the general verdict by revealing the jury found all facts necessary to establish liability under plaintiff's various theories of recovery. In short, we are not constrained by the damage special interrogatories in resolving the issues raised in this appeal because those interrogatories are meaningless and therefore irrelevant.

Relying on the authority discussed previously, above, we conclude, for reasons we shall explain, that the general verdicts of liability and damage are supported by plaintiff's defamation count. Consequently, we need not address each of defendants' 17 claims of error but instead shall limit our review to those claims which relate directly or indirectly to the "cause of action" for defamation. Accordingly, the contentions asserted by defendants pertinent either directly or indirectly to the defamation count or theory of recovery and which we, therefore, must resolve in this appeal are as follows:

(1) Were the facts contained in the various alleged defamatory statements attributed to defendants matters of

public concern such that plaintiff had the burden to prove falsity of those facts as well as defendants' fault, and, if so, did plaintiff meet that burden?

(2) Was plaintiff a public figure such that the trial court erred in failing to instruct the jury that in order to return a verdict in favor of plaintiff on the defamation theory of recovery the jury must find defendants published the statements in question with knowledge of their falsity or reckless disregard for the truth?

(3) Was there sufficient evidence to establish that defendants' wrongful conduct was the proximate cause of the various items of damage claimed by plaintiff?

(4) Was the award of compensatory damages excessive as a matter of law?

(5) Did the trial court adequately instruct the jury on plaintiff's duty to mitigate his damages?

(6) Was the punitive damage award improper, first, because defendant RNB, as an instrumentality of the federal government, was immune from liability for such damages, second, because evidence supported defendants' assertion that they relied on advice of counsel and therefore did not act with malice and, finally, because the award was excessive and therefore constituted a "taking of property without due process of law?"

(7) Were defendants denied a fair trial as the result of the trial court's erroneous and prejudicial evidentiary rulings and the trial court's purported bias in favor of plaintiff as evidenced by the trial court's demeanor and conduct?

(8) Did defendants act reasonably in rejecting plaintiff's pretrial offer for judgment under Code of Civil Procedure section 998, such that the trial court erred in awarding plaintiff attorneys' fees under Code of Civil procedure section 1021.1?

We are able further to reduce the issues we must address in this appeal by noting defendants' near-total failure to demonstrate that the issues asserted on appeal first were raised by defendants in the trial court. In other words, because the "party challenging a judgment has the burden of showing reversible error by an adequate record" (Ballard V. Uribe (1986) 41 Cal.3d 564, 574) defendants' claims of error must include appropriate citations to the record showing where the purported error occurred, and if appropriate, that defendants objected to that error in the proceeding below. Defendants, by failing in their opening and reply briefs to provide anything other than cursory citations to the joint appendix in lieu of clerk's transcript or to the reporter' transcript, have failed, almost without exception, to demonstrate error occurred in the trial court. In failing adequately to cite the record, defendants either misperceive the function of appellate review[12] or would have us assume the purported error was raised somewhere in the trial court and can be found by reviewing the voluminous joint appendix and reporter's transcript. Whatever the possible explanation, defendants generally have not set their burden to demonstrate error occurred in the lower court proceeding.

Defendants' oversight would be troublesome in a case which involved only a relatively small trial court record. The record here, however, is formidable, to say the least, and consists of over 4,000 pages of joint appendix and 3,349 pages

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[12] In this regard, we note defendants apparently do misunderstand the function of an appellate court, at least with respect to reviewing the sufficiency of the evidence, as reflected in their response to plaintiff's assertion that defendants, in this connection, set out only evidence favorable to the defense. Defendants retort, in pertinent part, that the settled rule . . . in measuring the sufficiency of the evidence," is that "this court must review the entire record on appeal." Defendants' assertion is incorrect, as we discuss in detail, below, to the extent it suggests we must read the entire record to determine what evidence was presented.

of reporter's transcript. Assuming defendants were aware of their burden on appeal to demonstrate that defendants complained of the purported error in the trial court, we can only interpret defendants' failure to include appropriate citations to the record as an implicit invitation to this court to ferret out the error ourselves. We decline defendants' invitation. To the extent we are unable to ascertain from defendants' briefs whether defendants first raised a particular claim of error in the trial court, we either shall not address that issue, because the error has not been preserved for review on appeal, or we shall address the issue according to our interpretation of the manner in which the error may have occurred in the trial court.[13]

Accordingly, we begin our discussion with defendants' assertion that the facts contained in the various alleged defamatory publications attributed to defendants were matters of public concern therefore, in order to establish liability for defendants' purported defamation, plaintiff had the burden to prove falsity of the facts as well as defendants' fault in

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[13] We anticipate defendants will complain that we did not point out this oversight when, as earlier noted, we directed defendants to supplement specific portions of their opening brief with appropriate citations to the record. Frankly, we did not realize at the time we issued that order that defendants' inadequate citation to the record extended beyond defendants' failure to provide citations in support of factual assertions and included near total failure to provide citations to support defendants' various and numerous claims of error. However, this latter oversight is one which should be understood by any party pursuing an appeal. Moreover, our order directing defendants to supplement their brief with appropriate citations to the record was issued as an accommodation to defendants. In other words, we were not required to notify defendants of their oversight in either respect, therefore, defendants may not be heard to complain.

publishing the statements.[14] Resolution of this issue requires us to address facts and legal principles which are also pertinent to resolution of defendants' contention, denominated above as issue number two, that plaintiff was a public figure, therefore, in order to establish liability or, alternatively, to recover punitive damages, plaintiff was required to prove defendants made the allegedly defamatory statements either knowing the statements were false or with reckless disregard for the truth. Because these two contentions are related, we shall address them both in this portion of our discussion.

1. DEFENDANTS' CHALLENGES TO PLAINTIFF'S DEFAMATION CAUSE OF ACTION

In raising their initial contention that defendants' allegedly defamatory statements pertained to matters of public concern, therefore, plaintiff had the burden to prove both falsity and fault, defendants have failed to demonstrate whether and if so how that issue was raised by defendants in the trial court. In their discussion of this contention,

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[14] Defendants' characterization of this issue, as set out in the caption which precedes defendants' discussion, is that "plaintiff has neither pleaded nor proved any cause of action for defamation since truth is an absolute defense and there can be no liability for unfavorable interpretation of the facts by others. Despite the caption, defendants do not discuss, least of all cite, the purported pleading defects. Moreover, such defects are irrelevant unless raised in the trial court prior to trial. Defendants do not indicate in their discussion whether they challenged plaintiff's pleadings, and if so on what basis. Absent such a challenge, defendants waive any pleading defect and are limited to attacking the sufficiency of the evidence to prove the elements of the cause of action. The elements of the cause of action, in turn, are defined in the jury instructions given by the trial court. Therefore, defendants may challenge the instructions if objections timely were asserted in the trial court. Because defendants' discussion does not mention the pleadings or jury instructions, but instead focuses on the sufficiency of the evidence, we shall focus our discussion, accordingly.

defendants' only reference to the trial transcript occurs in the context of reciting evidence offered by plaintiff to prove falsity of the purportedly defamatory statements in question. Consequently, we initially assumed the trial court instructed the jury regarding plaintiff's purported burden of proof and defendants' contention in this regard amounted to an attack on the sufficiency of the evidence to prove falsity of the statements. Upon reviewing the record, however, we ascertained that the trial court did not give the jury such instruction, but instead instructed the jury, apparently at defendants' request, that, "A publication in a newspaper regarding a private citizen may be privileged if it is a matter of public interest to the residents of that community, and only published within that community. A publication is of public interest if its appeal is not merely a matter of gossip or idle curiosity but deals with substantial matters affecting the general public such as the prevention of crime and the apprehension of criminals, the obtaining of relief from socially recognized evils, or the criticism of work performed by contractors paid from public funds. The privilege cannot be defeated if there was a `bona fide purpose to give the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff.' "[15]

Because the jury was not instructed that plaintiff had the burden to prove both falsity and fault, and further, because defendants do not suggest, either explicitly or by implication, that they requested such an instruction which the trial court

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[15] Although the foregoing jury instruction includes quoted language, the instruction included in the record does not identify the authority for the quotation. Moreover, although there is no indication on the instruction to identify defendants as the requesting parties, defendants acknowledged in both their motion for judgment notwithstanding the verdict and motion for new trial, that the trial court gave the instruction at defendants' request.

refused to give or that defendants otherwise raised this issue in the trial court, we need not and, therefore, shall not address defendants' initial claim of error. Stated bluntly, defendants have not demonstrated the issue was raised in the trial court and thereby preserved for review on appeal.

Defendants next contend, in connection with the defamation cause of action, that the trial court gave erroneous and incomplete instructions to the jury. Despite the contrary suggestion, defendant's discussion of this issue focuses exclusively on the trial court's refusal to instruct the jury on constitutional "actual malice" according to BAJI No. 7.04 which, as requested by defendants, would have instructed the jury, in pertinent part, that "A published statement about a public figure is absolutely privileged, even if false and untrue, unless the publication was made by the defendant with knowledge that it was false or with a reckless disregard for the truth."

Defendants raise two contentions in this regard. First, defendants contend the evidence presented at trial established plaintiff was a public figure or, at the very least, a limited purpose public figure, as defined in Gertz v. Robert Welch, Inc. (1984) 418 U.S. 323. Therefore, defendants argue, plaintiff was required to prove actual malice in order to establish defendants' liability for the alleged defamation and the trial court erred by refusing to instruct the jury in this regard. Alternatively, defendants contend that "[t]he settled law in this country is that no defamation plaintiff is entitled to punitive damages unless he can show that the defendant published the offensive statements with knowing falsity or with reckless disregard for the truth," therefore, the trial court erred in permitting the jury to award punitive damages without proof of actual malice.

In discussing these contentions, defendants correctly point out, with appropriate citations to the record, that the trial

court refused to give BAJI No. 7.04 as requested by defendants. Instead, the trial court instructed the jury, as pertinent to this issue, "If you conclude that defendant published a libel of plaintiff with actual malice, then in your discretion you may determine whether or not to award plaintiff punitive damages."[16] The trial court further instructed the jury according to BAJI No. 14.71[17] on "malice" necessary to support an award of punitive damages.

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[16] The record discloses that the foregoing instruction apparently is a modification of BAJI No. 7.12. The use note Accompanying BAJI No. 7.12 reflects that the instruction "should be used only in cases which are filed under Civil Code, § 48a [pertaining to defamation actions against media defendants], and if punitive damages are sought in other libel/slander cases the court should use BAJI 14.71 [general instruction on recovery and measure of punitive damages]." (See BAJI No. 7.12 (7th ed. 1986) p. 279, and related 1992 pocket part, pp. 106-107.) Because defendants are not members of the media, the trial court erred in giving this instruction. The correct instruction, as we shall explain, is BAJI No. 14.71, the general punitive damage instruction which requires and defines "malice," rather than actual malice."

[17] As given by the trial court, BAJI No. 14.71 provides, in pertinent part, that, "If you find that plaintiff suffered damage as a legal result of the conduct of defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendants for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of oppression or malice in the conduct on which you base your finding of liability. `Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried [on] by the defendant with a willful and conscious disregard for the rights or safety of others. A person acts with conscious disregard of the rights or safety of others when he or she is aware of the probable dangerous consequences of his or her conduct and willfully and deliberately fails to avoid those consequences. . . . [¶] `Despicable conduct' is conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people.

Defendants, as above noted, contend the trial court erred in refusing to give BAJI No. 7.04 regarding constitutional malice because plaintiff was a public figure. The general principles which govern resolution of this issue are well known and discussed thoroughly in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749. Simply stated, where the purportedly defamatory statement pertains to a public issue and the plaintiff is a public official or public figure, First Amendment free speech interests require that the defamation plaintiff prove not only that the statements are false but also that the statements were made with actual malice, i.e., knowledge of their falsity or reckless disregard for whether the statement was or was not false. (Id. at p. 755, citing New York Times Co v. Sullivan (1964) 376 U.S. 254, and Curtis Publishing Co. v. Butts (1967) 388 U.S. 130.) Where the allegedly defamatory statement pertains to a matter of public concern, but the plaintiff is neither a public official nor public figure, First Amendment interests, although less significant, nevertheless preclude states from allowing plaintiffs to recover "presumed or punitive damages absent a showing of 'actual malice.' " (Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 756, citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323.) Where the allegedly defamatory statements do not involve matters of public concern and the plaintiff is neither a public official nor public figure, First Amendment concerns are minimal and the "state interest in providing remedies for defamation . . . adequately support awards of presumed and punitive damages -- even absent a showing of `actual malice.' [Fn. omitted.]" (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 761.) Finally, the question of whether the foregoing constitutional protections apply in any given case is

one of law. (Connick v. Myers (1983) 461 U.S. 138, 148, fn. 7.)[18]

With the foregoing general principles in mind, we turn to those principles specifically pertinent to determining, as a question of law, whether plaintiff, as defendants contend, was a public figure and as such was required to prove actual malice. Here again, the specific principles which guide our analysis are discussed thoroughly by the California Supreme Court in Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, where the Court noted that in Gertz v. Robert Welch, Inc., the United States Supreme Court "defined two classes of public figures. The first is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' [Citation.] Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy." (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at pp. 253-254, citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351.)

According to the foregoing principles, and contrary to defendants' contention, we conclude, as a matter of law, that plaintiff was neither an all purpose nor limited purpose public

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[18] Defendants, in discussing this issue, also complain that the trial court refused their requested jury instruction which identified the circumstances under which a person may become a public figure. Because the determination of the plaintiff's status as a public figure is a question of law, rather than fact, we conclude the trial court correctly refused defendants' instruction on that issue.

figure. Defendants apparently contend plaintiff was an all purpose public figure as evidenced by the trial testimony of plaintiff' own witnesses that in Riverside plaintiff's name was a "household word" and even before plaintiff "ceased to be a member" of RNB's board of directors, plaintiff's "affairs" received press coverage.[19] In our view, the evidence relied on by defendants does not meet the standard enunciated by the Supreme Court in Gertz which requires "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society" before "an . . . individual is] . . . deemed a public personality for all aspects of his life." (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 352.) Absent such evidence, "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." (Ibid.)

Our analysis and discussion of whether plaintiff was a limited purpose public figure, i.e., in the context of the specific controversy in which the defamation occurred, is guided by the observations of the California Supreme Court in Reader's Digest Assn. v. Superior Court, supra, "that a person should not be considered a 'public figure' solely because that person . . . is a criminal defendant [citation]; has sought certain relief through the courts [citation]; or merely happens to be involved in a controversy that is newsworthy [citation]. Rather, as this court recognized in Vegod Corp. v. American

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[19] Defendants also point to testimony from various of plaintiff's witnesses, some of whom apparently worked for plaintiff as subcontractors, that the publicity regarding plaintiff's ouster from the board of directors was so pervasive (1) their children were taunted at school as a result of the press reports and (2) the news articles affected the opinion of plaintiff held by several witnesses. This evidence, in our view, undermines rather than supports defendants' position.

Broadcasting Companies, Inc. (1979) 25 Cal.3d 763 . . . , a 'public figure' plaintiff must have undertaken some *voluntary* act through which he seeks to influence the resolution of the public issues involved. [Fn. omitted.] As such, the mere involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of subsequent libel action. [Original emphasis.]" (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 254.)

The evidence relied on by defendants to support their contention plaintiff was a limited purpose public figure does not establish that the controversy in question involved public issues, least of all that plaintiff voluntarily injected himself into the fray for the purpose of influencing such issues. More particularly, defendants first point to evidence that plaintiff's "ouster" from the board of RNB wa a matter of "considerable interest in Riverside County" and the "incident was so newsworthy that children of plaintiff's subcontractors were allegedly taunted at school based on the press reports." Next, defendants contend plaintiff "voluntarily injected himself into the controversy" as evidenced by the fact and content of plaintiff's interviews by the press. In our view, that evidence establishes only that the local newspaper considered plaintiff's "ouster" from the board to be newsworthy and to that end contacted plaintiff and defendants for information and comments. In short, defendants' evidence demonstrates only that as a result of press interest and coverage, plaintiff's removal from the board of directors based upon plaintiff's purported loan delinquencies became a public controversy. Such evidence, as noted above in Readers Digest Assn. v. Superior Court, is insufficient to establish plaintiff became a public figure for purposes of that controversy.

According to Reader's Digest, a plaintiff does not become a limited purpose public figure, and therefore required

to prove actual malice, merely by being involved in a controversy which receives press coverage. The controversy must be one which involves "public issues." In other words, the controversy must involve a matter of legitimate public concern. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the United States Supreme Court "held that '[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.' [Citation.]" (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 761.)

Looking at the content, form and context of defendants' statements, as reported in the newspaper, we conclude plaintiff's removal from the board of directors of RNB and the details of plaintiff's purported loan defaults were not matters of public concern.[20] The public, or more particularly the local community in which the controversy occurred, had no power to influence the outcome of the controversy. The decision to remove plaintiff from the board of directors and the power to effect that decision rested exclusively with the board members.[21] No discussion or debate among members of the public was necessary and in fact, the bylaw amending the qualifica-

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[20] Arguably, plaintiff's removal from the board of directors based on his purported loan defaults was a matter of legitimate concern to RNB shareholders. Because defendants do not discuss this concern and further because plaintiff introduced evidence regarding four separate allegedly defamatory statements, proof of any one of which would support recovery, we shall not address the statements contained in the proxy statement.

[21] Throughout their brief, defendants use various euphemisms to describe plaintiff's departure from the board of directors. We decline to engage in such fiction and describe that event as plaintiff's removal from the board pursuant to the board's adoption of the now well-described bylaw.

tions for board members specifically precluded specified members of the public, i.e., shareholders, from in any way circumventing plaintiff's removal from the board. Moreover, the content of defendants' statements, which included not only the fact of plaintiff's removal from the board but also the specific details of plaintiff's purported loan defaults, went well beyond any arguable interest the public might have had in the controversy.

Arguably, defendants had an interest in publicly commenting on plaintiff's removal and purported loan defaults in view of RNB's apparent dependence on the local community for its depositors and customers. In other words, RNB legitimately might be concerned that the controversy, and attendant publicity, surrounding plaintiff's removal from the board due to alleged significant loan defaults could undermine trust and confidence in RNB among its customers and potential customers, most of whom presumably resided in the local community. Defendants' concerns in this regard do not elevate an otherwise private dispute to a controversy involving public issues. In short, we conclude here, as with the credit report at issue in Dun & Bradstreet, that defendants' statements to the press involved "speech solely in the individual interest of the speaker and its specific business audience. . . . This particular interest warrants no special protection when -- as in this case -- the speech is wholly false and clearly damaging to the victim's business reputation. . . ." (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, 472 U.S. at p. 762.) Accordingly, we conclude plaintiff was not a public figure, either for all purposes or for purposes of this controversy. Therefore, the trial court did not err in refusing to give BAJI No. 7.04, or any other instruction requested by defendants, regarding constitutional malice.

We also reject defendants' contention, as above noted, that punitive damages may never be recovered in a defamation

action absent proof of actual malice, therefore the trial court erred in refusing to instruct the jury in this regard. Defendants' assertion is an incorrect statement of law. As previously discussed, above, the Supreme court held in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, that proof of actual malice is not required in a defamation action by a private person against a non-media defendant where th defamatory statements do not pertain to matter of public concern. Under such circumstances, presumed and punitive damages may be recovered without proof of actual malice. (Dun & Bradstreet, Inc. v.Greenmoss Builders, Inc., supra, 472 U.S. at 763.)

We have concluded, as discussed previously, that plaintiff in the context of the defamation action, was not a public figure for all purposes. We have further concluded because the defamatory statements did not relate to matters of public concern, plaintiff was not a limited purpose public figure. Although actual malice must be proved under Civil Code section 48a (see fn. 16, supra), defendants clearly are not members of the media. Consequently, in order to recover punitive damages, plaintiff must prove malice as defined in Civil Code section 3294. The trial court, as noted above, instructed the jury on both the requirement and definition of malice as used in Civil Code section 3294 by giving BAJI No. 14.71. Accordingly, we conclude, to the extent challenged by defendants, the trial court's jury instructions in connection with the defamation cause of action properly were given.

Defendants' final challenge to the defamation cause of action, albeit raised by defendants in the connection with their assertion that the compensatory damage award was excessive as matter of law, is that "plaintiff did not meet his burden of establishing the falsity of any statement attributed to defendants. n As we have previously discussed, in detail, because the publications in question did not involve matters of public concern and because plaintiff was not a public figure, plaintiff

was not required to prove falsity of the statements. Stated otherwise, "The burden of proof with respect to the issue of truth or falsity is on the defendant." (Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 753, fn. 37, quoting Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal.2d 224, 233.) The trial court properly instructed the jury in this regard.

Because defendants steadfastly have adhered to the assertion that plaintiff had the burden to prove falsity, they do not address the question of whether their evidence proved the truth of each of the four defamatory statements in question. In order to dispel any suggestion that defendants may have met their burden in this regard we briefly shall review the pertinent evidence.

We begin our discussion in this regard with the well - established principle that "a reviewing court must start with the presumption that the record contains evidence to sustain every finding of fact; the appellant must demonstrate that there is no substantial evidence to support the challenged findings; one contending the evidence does not support some particular issue of fact must set forth in his brief all the material evidence bearing upon that issue and not merely the evidence favorable to him; failure to so state the evidence shall be deemed a waiver of the claimed error. [Citations.] [Original emphasis." (Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal.App.3d 101, 152.)

Although defendants did not directly and expressly discuss the evidence pertinent to the defense of truth, they did so by implication in their misguided challenge to the sufficiency of plaintiff's evidence to prove falsity. In so doing, defendants did not comply with the foregoing obligation and established only that there was a conflict in the evidence. "The test of course, is not whether there is a substantial conflict in the evidence but whether there is substantial evidence in favor

of the respondent. [Citations.]" (Crogan v. Metz, supra, 47 Cal.2d at p. 404.) For this reason, we conclude defendants have failed to overcome the presumption on appeal that the record contains evidence sufficient to support every factual determination essential to the underlying judgment which includes the finding, implicit in the jury's determination of liability under plaintiff's defamation theory, that defendants did not prove the truth of each of the defamatory statements.

Moreover, we conclude substantial evidence supports the jury's implied finding that some, if not all, of the publications attributed to defendants were false. Defendants acknowledge that plaintiff's defamation cause of action was based upon four allegedly defamatory publications -- the two March 1987 newspaper articles, the March 1986 [sic] proxy statement And the April 1987 letter from Billings to the shareholders. At trial, plaintiff sought to prove the two newspaper articles and the proxy statement were false because all three publications wrongly stated both the fact and amount of plaintiff's purported loan defaults. To that end, and as above noted, plaintiff presented evidence to show his loan history with RNB consisted of a series of short-term, interest only loans, the majority of which were commercial. RNB, through Billings, the president of RNB, approved all loans to members of the board of directors, and routinely rolled-over plaintiff's loans so long as plaintiff was current on monthly or quarterly interest payments. Plaintiff's loans were all secured with adequate collateral. Plaintiff offered evidence, consisting of his canceled checks to prove that during all of 1986 plaintiff was current on loan interest payments.

Defendants, through the testimony of Richard Larson, the credit administrator of RNB at the time pertinent to the issues raised at trial, attempted to refute plaintiff's evidence that his interest payments were current during 1986, the period arguably in question at trial. According to the evidence, during

1986, plaintiff had four loans outstanding from RNB. It was developed through Larson's testimony and RNB's own records that due to an apparent accounting error by RNB, plaintiff was not credited with a $4,000 interest payment made in March 1986. As a result of that error, defendants erroneously concluded plaintiff was in default on various loans when, in fact, he was not. According to defendants' own records, as of December 31, 1986, plaintiff was current in payments on two of the four loans and was delinquent on one month of interest payments on the other two. The combined delinquent interest payments on those two loans totalled approximately $3,500, less than the amount of the plaintiff's uncredited $4,000 payment.[22] Because Billings, contrary to established procedure, did not renew or extend plaintiff's then outstanding loan, the principal balance was also due and owing.

The foregoing, in our view, constitutes substantial evidence to support the jury's implied finding that plaintiff was not in default on any loans, least of all on $715,000 in loans, as stated in the two newspaper articles and the proxy statement. In other words, defendants did not meet their burden to prove the foregoing statements were true. Accordingly, we conclude substantial evidence supports the jury's implied determination that the statements attributed to defendants contained in the two newspaper articles and the proxy statement were false. That implied finding is sufficient to establish liability of defendants under the defamation cause of action. Therefore, we need not address Billings' letter to the shareholders.

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[22] Defendants further emphasized the falsity of defendants' various statements regarding plaintiff's purported loan defaults as reported in the newspaper and contained in the proxy statement when Larson, apparently from the witness stand and during his testimony, presented plaintiff with a check from RNB for plaintiff's loan overpayment.

In summary, we conclude the jury's general verdict is supported by the jury's finding of liability under the defamation theory of recovery. To the extent defendants challenge that theory, we conclude, as discussed above, that each of defendants' contentions lack merit. This conclusion, as we have previously discussed obviates the need to determine whether other theories of recovery pleaded and proved by plaintiff also support the general verdict.

The remaining issues raised by defendants in this appeal, as noted above, are directed at attacking, first, the fairness of the trial, next, the general and punitive damage verdicts and, finally, the trial court's action in granting plaintiff's motion for an award of attorneys' fees. We address each of these contentions in the remaining portion of this opinion.

2. COMPENSATORY DAMAGE AWARD

We begin our discussion with defendants' contention, which we designated, above, as issue number three, that there was insufficient evidence to prove defendants' wrongful conduct was the proximate cause of the various items of damage claimed by plaintiff at trial. Despite defendants' broad description of the issue, defendants' discussion focuses on the jury's purported award of damages allegedly incurred by plaintiff as the result of plaintiff's asserted "forced sale" of his RNB stock.[23]

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[23] Defendants also purport, in a single concluding paragraph devoid both of citations to the record and discussion, to challenge the causal connection between defendants' conduct and "any of the other damages incurred by plaintiff's specifically, plaintiff's purported loss of construction business and loss of ability to obtain loans and credit from financial institutions other than RNB. In view of our resolution of defendants' proximate cause contention, it is unnecessary for us to address this final, conclusory assertion.

A. **Proximate Cause**

We admit to some difficulty in discerning the precise nature of defendants' proximate cause contention. Defendants, as above noted, initially assert there was "insufficient proof" of proximate cause to establish liability on the part of defendants for the loss or damage plaintiff purportedly incurred as the result of the forced sale of his RNB stock, causation being "a critical element of any tort action." Thus, defendants begin their discussion by suggesting the problem is one of proof to establish an essential factual element. However, in the same paragraph, defendants conclude, with citation to authority, that, "California courts have stated emphatically that proximate cause is always in the first instance a question of law.[24] In short, we cannot determine clearly whether defendants contend, as a matter of law, that defendants' conduct was not the proximate cause of the loss plaintiff claimed to have suffered in selling his RNB stock or whether defendants challenge the sufficiency of the evidence to prove legal or proximate cause.

In either case, defendants' contention is unavailing. In this regard we note defendants again have not provided citations to the record to disclose whether and if so in what

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[24] Whitcombe v. County of Yolo (1977) 73 Cal.App.3d 698, cited by defendants as authority for the above-noted quotation, does in fact include the quoted language. Id. at p. 707.) However, Whitcombe supports the quotation with a citation to Golden v. Dungan (1971) 20 Cal.App.3d 295 which holds, "The question of causation . . . is one to be determined on the evidence. 'Proximate cause is legal cause, as distinguished from the layman's notion of actual cause, and is always in the first instance, a question of law. . . . It becomes a question of fact when conflicting inferences or conclusions can be drawn from the evidence within the area of proximate cause as legally defined. [Citations.]" (Id. at p. 311.) While defendants also cite Golden, they apparently did not review the case for had they done so they would have recognized that proximate cause in the present context is a factual determination.

manner this issue was raised in the trial court. We have determined from our review of the record on appeal that defendants, in both their motions for judgment notwithstanding the verdict and new trial, argued the insufficiency of the evidence to prove defendants' conduct was the proximate cause of plaintiff's damage. In addition, prior to trial, defendants moved to exclude evidence of the value of plaintiff's stock at the time of the purported sale. That motion, however, was based on asserted pretrial discovery abuses by plaintiff and thus effectively constituted a request for sanctions based upon plaintiff's purported failure to disclose fully prior to trial the damage plaintiff claimed as the result of such sale. In other words, the record reveals defendants did not assert in the trial court the latter contention pertaining to proximate cause as a matter of law. Therefore, defendants have not preserved that contention for review on appeal.

Defendants, as noted above, did assert in the trial court the former contention regarding insufficiency of the evidence to prove proximate cause and arguably have preserved that assertion for review on appeal. The problem here, however, lies not in defendants' failure to preserve the issue for appellate review but rather in defendants' apparent failure to appreciate the significance of the jury's general damage verdict. Simply stated, we cannot determine either from the fact or amount of the general damage verdict, or for that matter from the special interrogatories[25], whether the jury awarded plaintiff compensation for the loss plaintiff claimed

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[25] The special interrogatories pertinent to damages, as set forth above, asked the jury to determine the total amount of damage plaintiff suffered under each purported cause of action or theory of recovery. In calculating those damages, the jury was not asked to determine whether defendants' conduct was the proximate cause of specific items of damage requested by plaintiff. Thus, the special interrogatories on damages reveal nothing more than the jury's mathematical calculations.

to have suffered as the result of the forced sale of his RNB stock. In other words, defendants' contention is based purely on speculation. Because neither the general damage verdict nor the special interrogatories identify the specific items of damage the jury included in their damage award, defendants are limited to challenging that award solely on the basis of excessiveness. Accordingly, we next address defendants' contention that the compensatory damage award was excessive as a matter of law.

B. Excessiveness of Compensatory Damage Award

Defendants, as set forth above as issue number four, contend the compensatory damage award was excessive as a matter of law. In raising this contention, defendants again overlook the significance of the general damage verdict and instead focus on the insufficiency of the evidence to establish the individual items or elements of damage plaintiff sought to recover at trial. As we pointed out, above, we cannot determine, either from the general damage verdict or the special interrogatories, the specific items of damage the jury included in their total compensatory damage award.

Moreover, and as previously discussed, because the jury returned a general verdict on liability, we must affirm the judgment if the verdict is supported under any theory of recovery plaintiff pursued at trial. We have concluded, as discussed at length above, the liability verdict is supported by the defamation theory, based on our rejection of defendants' challenges to that count. We similarly conclude, as we shall discuss, that the general damage verdict is supported by the defamation count and thus shall address defendants' contentions regarding excessiveness only as pertinent thereto.

" 'In considering whether the [award was] excessive, we realize the very familiar rule that to the jury, to a very large extent, is committed the responsibility of awarding

compensation for an injury sustained. When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act.' [Citation.]" (Cunningham v. Simpson (1969) 1 Cal.3d 301, 308-309.)

With the foregoing general principle in mind, we first note that the damages recoverable by plaintiff for defamation include both special and general damages. More particularly, and as the trial court instructed the jury, if the libelous statements attributed to defendants were defamatory on their face, then plaintiff was entitled to recover general damages without the need of proving special damages. If however, the statements were defamatory only by reference to "surrounding circumstances" then before the jury could "award any damage to plaintiff, plaintiff must first establish that he has sustained special damage as a legal result of the defamatory statement." (See BAJI No. 7.09.2 (7th ed. 1986) pp. 272-273.) In other words, plaintiff was entitled to recover both special and general damages if the defamatory statements were libelous on their face. Otherwise, plaintiff was entitled to recover general damages only if he first proved special damage.

We need not determine whether the statements here in question were libelous on their face or only by reference to surrounding circumstances because plaintiff presented evidence to show the special damage plaintiff suffered as a result of the defamatory publications. Special damages, as the trial court instructed the jury, "compensate plaintiff for losses, if any, suffered to date and which he is reasonably certain to suffer in the future in respect to his property, business, trade, profession, or occupation including the amount of money which plaintiff has expended as a result of the alleged libel which were legally caused by the libel which was published by the defendant." (See BAJI No. 7.11 (7th ed. 1986) p. 277.)

As defendants acknowledge, plaintiff presented evidence to show special damage of slightly more than $600,000 in lost construction business plaintiff suffered as the result of defendants' defamatory statements. Defendants challenge the sufficiency of that evidence and further assert plaintiff failed to demonstrate that such losses were proximately caused by defendants' defamatory statements. We disagree and here again note, with respect to both assertions, that defendants recount only the evidence favorable to the defense. Thus, defendants have demonstrated only that there was conflicting evidence on the question of special damage. That showing, as discussed above, is inadequate to overcome the presumption that the record contains evidence to sustain every essential finding of fact.

In addition to plaintiff's evidence regarding the loss of construction revenue, we are of the view that plaintiff's purported loss on the sale of his RNB stock is evidence of, and therefore compensable as, special damage. According to plaintiff's testimony, the RNB stock was the only asset plaintiff possessed which easily and readily could be converted to cash. Plaintiff felt compelled to sell that stock and pay off the outstanding RNB loan balances due to the publicity attending plaintiff's removal from the RNB board and in order to lessen the adverse impact that publicity would have on plaintiff's ability to obtain credit from other financial institutions.

To that end, plaintiff offered evidence to show that after defendants adopted the bylaw and removed plaintiff from the board of directors, plaintiff entered into an agreement with Hemet Bancorp (Hemet) to sell his shares of stock in RNB ln order to repay the principal balance on his outstanding RNB loans. Plaintiff apparently originally contacted Hemet in order to obtain a loan, secured by the RNB stock, in order to pay the outstanding RNB loans. Hemet declined the loan but

offered to purchase plaintiff's stock in RNB. Apparently because banking regulations precluded plaintiff from selling his entire block of RNB stock to Hemet without first obtaining regulatory approval, Hemet and plaintiff agreed to a transaction in which plaintiff immediately would sell 4.9 percent of his stocks for cash, the balance to be sold upon receipt of the necessary regulatory approval. Hemet, in turn, agreed, as a condition of the sale, to loan plaintiff the additional funds necessary to pay off plaintiff's RNB loans. Hemet, apparently recognizing plaintiff's "vulnerability" agreed to pay plaintiff only book value of $6.44 per share. At trial, plaintiff offered evidence to show that the value of the stock, presumably at the time of the sale to Hemet, was between $9.25 and $15 per share.

We conclude the foregoing constitutes substantial evidence to support the jury's implied finding that plaintiff suffered special damage as the result of defendants' defamatory statements. Having so concluded, the jury then was allowed to consider and award general or compensatory damages. In this regard, the trial court instructed the jury according to BAJI No. 7.10 that, "If you find that the defendant defamed plaintiff by a libel and that such libel was a legal cause of general damages to plaintiff, in determining the amount of such general damage, you should consider but are not limited to the following: [¶] 1. The extent of the publicity given by the defendant to the libel; [¶] 2. Plaintiff's good name, reputation, and the loss thereof; [¶] 3. Plaintiff's shame, mortification, insured feelings and mental suffering; [¶] 4. Plaintiff's prominence in the community where he lives; [¶] 5. Plaintiff's professional or business standing in the community where he does business. [¶] In determining the amount of plaintiff's damage, the law does not establish any absolute fixed or mathematical rule or standard by which to compute such damage; therefore, you may exercise your discretion but must do so without passion or prejudice for or against either

party. Furthermore, such damages shall not be enhanced by a repetition of such libel by third persons who are not parties to this action unless such repetition was authorized or intended or could have been reasonably foreseen."

Evaluating the general compensatory damage verdict according to the foregoing instruction, and the factors enumerated therein, we conclude the award of $2,254,787 is not excessive, assuming the damage verdict includes both special and general damages attributed to defendants. With respect to general damages, defendants' defamatory statements regarding plaintiff's purported loan defaults were published in the local newspaper on two separate occasions. Defendants acknowledge, albeit in the context of arguing plaintiff was a public figure as set out above, that the newspaper coverage of plaintiff's "ouster" from the RNB board of directors was extensive and generated a great deal of public interest. Moreover, and again by defendants' admission, the effect of that newspaper publicity, which defendants presumably intended by allowing the interviews with the press, apparently was s0 pervasive that children of plaintiff's subcontractors were taunted at school. That evidence in our view reveals the extent of the publicity generated by the newspaper articles alone, and without considering the proxy statement or Billings' letter to the shareholders, was far reaching in the community.

Plaintiff also presented testimony from several witnesses to show plaintiff generally was a well-respected member of the community and a successful local real estate developer and building contractor. One of plaintiff's friends testified that he came close to physical blows with a group of people who openly mocked plaintiff. In short, the evidence presented at trial and considered by the jury supports both the award and amount of compensatory damages in connection with the defamation action. Consequently, we reject defendants'

assertion that the compensatory damage award was excessive as a matter of law.

C. Mitigation of Damages Instruction

As a separate contention, but one related to the compensatory damage award, defendants contend the trial court gave inadequate instruction to the jury on plaintiff's duty to mitigate his damages, a contention we identified as issue number five, above. Specifically, defendants contend the trial court erred in giving only one instruction on the duty to mitigate damages rather than the three instructions requested by defendants. Here again, we disagree.

In this regard, the trial court instructed the jury, "Defendants are not required to compensate plaintiff for any expenses plaintiff could have avoided by a reasonable effort." Defendants do not contend that this instruction is an inaccurate or erroneous statement of the law. Instead, defendants argue, in effect, that their three requested instructions more fully explained to the jury the legal principle of mitigation.[26] In other words, defendants contend only that their proposed jury instructions were better than the instruction on mitigation of damages given by the trial court.

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[26] The three instructions defendants requested and the trial court refused are as follows:

"Where damage to person or property is threatened or inflicted by either breach of contract or tort, the injured party has the active duty to use reasonable care and diligence to prosect himself and minimize the loss. If plaintiff, by his own neglect, unnecessarily enhances the damages, he cannot recover the excess."

"Plaintiff cannot recover for alleged expenses incurred in connection with his construction business which he could have avoided by reasonable effort, or which resulted from his own neglect."

"Plaintiff is not entitled to recover damages for alleged losses arising from the sale of his Bank stock in excess of those losses he could have minimized by using reasonable care.

Our function is to determine whether error occurred and not to evaluate quality of performance. Because defendants do not challenge the accuracy of the mitigation instruction given by the trial court but only contend that their requested instructions better stated the pertinent legal principles we need not address defendants' argument in this regard. The trial court instructed the jury on plaintiff's duty to mitigate his damages, as defendants concede, therefore, no error occurred.

3. PUNITIVE DAMAGES AWARDS

We next address defendants' contentions pertinent to the punitive damage award, issue number six, above. In this regard, as set forth above, defendants contend that such award was improper, first, because defendant RNB, as a federally chartered bank, was an instrumentality of the federal government and as such was immune from liability for punitive damages. Next, defendants contend the award of punitive damages was improper because there was evidence that defendants, in adopting the bylaw which disqualified plaintiff from continuing to serve on the board of directors of RNB, relied on advice of counsel. Finally, defendants contend the punitive damage awards were excessive as a matter of law and as such constitute a taking of property without due process of law.

A. Immunity

Our discussion of defendants' immunity contention shall be brief. Once again, defendants' discussion of this assertion does not mention whether and if so at what point defendants raised this assertion in the trial court. Presumably, immunity from liability for punitive damages is an affirmative defense and logically would have been raised by defendants in some manner prior to trial, ideally by way of a motion to strike the punitive damage allegation contained in plaintiff's amended complaint. Our review of the record reveals defen-

dants did not challenge the punitive damage allegation in any manner prior to trial.[27] In other words, defendants permitted the issue of punitive damages to be presented to jury without apparent objection and therefore presumably waived the assertion.

Defendants, belatedly in our view, did assert the defense of immunity in their motion for new trial. Assuming RNB did not waive the assertion, as above noted, we nevertheless conclude the contention lacks merit. Defendants, or more correctly, RNB, cite extensive authority for the general proposition that the federal government and its instrumentalities are immune from liability for punitive damages. Defendants, however, do not provide any authority to support the specific proposition that federally chartered national banks such as RNB, merely by virtue of their federal charter, are instrumentalities of the federal government and, thus, are similarly immune from such liability. As plaintiff points out, numerous cases, albeit without expressly discussing the immunity issue, uphold punitive damage awards against national banks. (See, e.g., Sanchez-Corea v. Bank of America (1985) 38 Cal.3d 892, 909.)

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[27] In reviewing the record, se have not read each page of the 4,000 pages of the joint appendix in lieu of clerk's transcript and exhibits. We save, however, reviewed the 11 pages of index to the joint appendix to determine whether any motion made by defendants prior to trial included the immunity assertion. That index reveals that defendants did not file a written motion to strike the punitive damage allegation. Nor is the immunity contention asserted by defendants in their demurrer to plaintiff ss amended complaint or motion for summary adjudication of issues. In fact, defendants did not even raise immunity as one of the affirmative defenses in their answer to plaintiff's amended complaint. We decline to read the more than 3,300 pages of reporter's transcript to determine if defendants orally moved to strike or otherwise challenge the punitive damage allegation on the basis of purported immunity.

Accordingly, for either or both of the foregoing reasons, we conclude the immunity contention lacks merit.

B. **Advice of Counsel**

Defendants' second attack on the punitive damage award is equally unavailing, although for different reasons. Defendants here contend the punitive damage issue should not have been submitted to the jury in light of the evidence that defendants relied on the advice of counsel in enacting the bylaw which removed plaintiff from the board of directors. In other words, defendants contend advice of counsel if not a complete defense, at the very least, demonstrates defendants acted in good faith in adopting the bylaw, and thus negates malice.

Here, yet again, defendants do not mention whether this contention was raised in the trial court and if so in what context and manner. We shall not belabor that defect here because it is expedient to note, assuming the contention was raised below, it would have no application to the defamation theory of recovery. As the above-emphasized language indicates, this assertion, assuming it was raised below and further assuming it is an accurate statement of the law, would apply, if at all, to the first count for purported illegal ouster and punitive damages awarded in connection therewith. Defendants do not suggest that the statements to the press, as recounted in the newspaper, were made on the advice of counsel thereby establishing defendants' good faith and concomitantly negativing malice in connection with the defamation count.

Moreover, the jury, presumably at defendants' request, was instructed that "Plaintiff cannot recover punitive damages where defendant acted in good faith reliance on-the advice of counsel." The jury, as evidenced by the fact that it awarded punitive damages to plaintiff, obviously found the actions of RNB and Billings, in connection with adoption of the bylaw and in all other respects, were not the result of good faith reliance on the advice of counsel. We are bound by this

implied finding absent a showing by defendants that it is against the weight of the evidence. Defendants have not so shown. Consequently, for each of these reasons, we conclude defendants' contention regarding advice of counsel is meritless.

C. **Excessiveness**

As a final challenge to the punitive damage award defendants assert the award was excessive in light of defendants' conduct and net worth, and as such, constitutes an unconstitutional taking of defendants' property without due process of law. Again, defendants do not mention whether this assertion wag raised in the trial court. We have determined defendants have preserved this issue for review on appeal by raising it in both their motion for judgment notwithstanding the verdict and motion for new trial. Correctly stated, the issue raised by defendants is whether the trial court abused its discretion in denying either defendants' motion for judgment notwithstanding the verdict or motion for new trial with respect to the punitive damage award on the grounds set forth above. We conclude, as we shall explain, that the trial court did not abuse its discretion.

The pertinent facts, as mentioned above, are after the jury returned its general verdict finding liability under each theory of recovery pursued by plaintiff at trial, the jury then considered the issue of punitive damages. On this issue, the jury returned a verdict awarding plaintiff punitive damages of $2,300,000 against RNB and $130,000 against defendant Billings. The punitive damage awards apparently represent one year's income for RNB and one year's salary for Billings.[28]

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[28] We were unable to locate that portion of the record which supports this assertion. The financial statements of both RNB and Billings contained in the exhibit portion of the joint appendix, and cited by plaintiff to support the foregoing assertion, do not expressly identify

(continued...)

Defendants, in connection with a different issue and in an earlier portion of their brief, contend the punitive damage award must be reversed because it is impossible to determine whether that award was based upon the defamation cause of action. In support of this assertion, defendants rely on Lanouette v. Ciba-Geigy Corp. (1990) 230 Cal.App.3d 889. On December 3, 1990, after defendants filed their opening brief in this appeal, the California Supreme Court granted review of Lanouette. (See Lanouette v. Ciba-Geigy Corp. (1990) 222 Cal.App.3d 1094.) Consequently, Lanouette is no longer citable authority or "good law." Because defendants do not cite any other authority to support this contention, we shall not address it, other than to note, in our view, that portion of the Lanouette opinion relied on by defendants was decided wrongly.[29]

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[28](...continued)
the annual income of either defendant. However, because defendants neither discuss nor refute the portion of plaintiff's brief which includes this assertion, we assume the assertion is an accurate statement of the facts presented in the trial court and therefore is correct.

[29] The Lanouette court concluded, because the plaintiff in as wrongful termination of employment action was not entitled, as a matter of law, to recover tort damages for breach of the implied covenant of good faith and fair dealing, the punitive damage award, although correct under plaintiff's intentional infliction of emotional distress theory of recovery, had to be reversed because it could not be determined which theory of recovery the jury relied on in awarding punitive damages. According to the Lanouette court, and relying exclusively on Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal.App.2d 268, "Where a jury verdict is erroneous in one part and the award of damages is not reasonably subject to separation, the judgment on that issue must be reversed." (Lanouette v. Ciba-Geigy Corp., supra, 230 Cal.App.3d at p. 908.) Di Giorgio, in turn, holds that because the purpose of punitive damages is to punish a defendant for his or her own wrongful conduct, a punitive damage award in a lump sum, jointly and severally, against multiple defendants in a defamation action" is not reasonably subject to separation" and therefore must be reversed. (Di Giorgio Corp. v. Valley
(continued...)

Turning to defendants' assertion that the punitive damage award was excessive, therefore the trial court abused its discretion in denying defendants' motion for new trial, "It is a well-settled rule that after an exemplary damage award has been approved by the trial court with the denial of a motion for new trial, as in this case, the reviewing court will declare the amount excessive only if, upon a review of the entire record, the award must be said to be so grossly excessive as to indicate passion or prejudice on the part of the jury [citations]." (Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 937.) Stated otherwise, "our review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. . . . [Citation.]" (Neal v. Farmers Ins. Exchange (1978) 21 cal.3d 910, 927, quoting Bertero v. National General Corp. (1974) 13 Cal.3d 43, 65, fn. 12.)

According to Neal v. Farmers Ins. Exchange, the factors reviewing courts should consider to determine whether punitive damage awards are excessive are "[1] the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. . . . [2] the amount of compensatory damages awarded; in general even an act of considerable reprehensibility will not

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[29](...continued)
Labor Citizen, supra, 260 Cal.App.2d at p. 276-277.) In our view, the holding in Di Giorgio does not support the conclusion arrived at by the court in Lanouette and clearly has no pertinence in this appeal where, as set out above, the jury separately awarded punitive damages against RNB and Billings.

be seen to justify a proportionally high amount of punitive damages if the actual harm suffered is small [3] Also to be considered is the wealth of the defendant; obviously, the function of deterrence . . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. . . . By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d at p. 928.)

Viewing the instant case according to the foregoing factors, we cannot conclude, as a matter of law, that the punitive damage awards here in question were excessive. In this regard we note the trial court instructed the jury according to the foregoing factors and we must presume, absent evidence to the contrary, the jury followed that instruction and considered the reprehensibility of defendants' conduct as well as defendants' financial condition in calculating the amount of the respective punitive damage awards.

Defendants argue their conduct was not reprehensible and assert, as apparently they have from the inception of this litigation, that in adopting the bylaw and informing shareholders of plaintiff's purported loan defaults, "the defendant directors were fulfilling their duties s fiduciaries of the bank." The jury, and later the trial court in ruling on defendants' motion for new trial, apparently determined otherwise. More significantly, in this connection defendants do not discuss the reprehensible nature of the various defamatory statements regarding both the fact and amount of plaintiff's purported loan defaults as set forth in the newspaper article and proxy statement. We interpret defendants' silence on this point either as a significant omission or an implicit admission that such

conduct was sufficiently reprehensible to support the punitive damage verdict.[30]

Likewise, defendants do not discuss the wealth factor. Here, again, we view defendants' silence as an implicit admission that the amounts of the respective punitive damage awards against RNB and Billings, which as above noted, equate to one year of income for each defendant, do not run afoul of this factor. We similarly reject defendants' statement, unaccompanied by any discussion, that the amounts of the respective punitive damage awards are disproportionate to the compensatory damage award. As plaintiff points out, the combined total of both punitive damage awards is $2,430,000, which is nearly equal to the compensatory damage award of $2,254,787. We cannot say as a matter of law that a ratio of one to one is disproportionate. In fact, common sense and logic suggest quite the opposite conclusion.

In summary, we conclude the punitive damage awards comport with each factor enunciated in Neal and as such cannot be said to be excessive as a matter of law.

As a final challenge to the punitive damage awards defendants assert the awards in this case violate the due process clause and therefore are unconstitutional. In support of this assertion, defendants rely on Browning-Ferris Industries v. Kelco Disposal, Inc. (1989) 492 U.S. 257, 109 S.Ct. 2909, 2921, where the United States Supreme Court declined to address a due process challenge to a punitive damage award

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[30] For this same reason, we reject defendants' suggestion that the punitive damage awards are not supported by substantial evidence. While defendants discuss the pertinent legal principle, they fail to discuss any facts, or lack thereof. We again take defendants' failure as an implicit admission that the evidence discussed above in connection with our discussion of the defamation cause of action is sufficient to support the punitive damage award.

after first noting that, "The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was reached in proceedings lacking the basic elements of fundamental fairness."

Relying on the foregoing language, and similar language in other cases, defendants contend the trial below "was a blatant denial of procedural safeguards to the defendants . . . . The [trial] court's rulings which permitted the admission of evidence which was highly prejudicial to the defendants, but excluded evidence which would have enabled the defendants to overcome the prejudice caused by such erroneously admitted evidence, and the innumerable erroneous jury instructions given, all bear ample testimony to this fact. The award of punitive damages violated the defendants' right to due process of law . . . ."

The problem we have in addressing this contention is one repeated throughout defendants' brief -- the total absence of any reference to, least of all discussion of, the purportedly erroneous evidentiary rulings and jury instructions. Presumably, defendants' assertions relate to purported erroneous evidentiary rulings and jury instructions identified by defendants in earlier portions of their brief, specifically, in the sections entitled "The Numerous Erroneous Evidentiary Rulings Hade by the Trial Court" and "The Jury Instructions." In these sections, defendants identify the evidentiary rulings and jury instructions about which defendants complain but defendants do not discuss how or why such rulings and jury instructions were erroneous. In other words, defendants have failed to demonstrate error occurred.

Moreover, we have never been persuaded by the argument that the trial court admitted evidence "highly prejudicial" to one of the parties. Presumably, all evidence presented by one side of a lawsuit is probative and in that

sense prejudicial to the other side. The relevant inquiry is whether such evidence was otherwise inadmissible or whether the probative value of the evidence substantially is outweighed by the prejudicial effect. (See Evid. Code, § 352.) In short, defendants have not raised the pertinent and legally cognizable arguments on appeal.

4. DENIAL OF A FAIR TRIAL

We reject defendants' assertion, raised as a separate contention in this appeal and identified as sisue number seven, above, that "the demeanor and conduct of the trial judge, together with his partiality to plaintiff's case, deprived defendants of the right to a fair trial." Here, again, defendants identify the various ways in which defendants contend the trial court revealed purported bias in favor of plaintiff but, in doing so, defendants do not demonstrate error occurred. For example, defendants assert "the trial court's prejudicial predisposition became apparent on the very first day of trial when it ruled on the parties [sic] motions in limine. The trial court granted plaintiff's motion in limine to exclude the most probative and exculpatory evidence on Mr. Billings [sic] absence of malice against the plaintiff. However, the court denied defendants' motion in limine and allowed the plaintiff to testify on the same malice issue, and as to events which occurred over 20 years prior to the time of trial." Ignoring defendants' failure to identify the purportedly "probative and exculpatory evidence" in question, apparently inviting this court to extract that information either from defendants' 119-page brief or the 7,000-page record, defendants have not shown that any error occurred.

In short, defendants' claim of purported bias consists of a laundry list of instances during trial in which the trial court ruled or acted in favor of plaintiff and against defendants. Thus, among other things, defendants point to the fact that the trial court (1) permitted plaintiff's counsel to engage

in "strong" opening argument without interruption from the bench but interrupted defendants' counsel at the start of defense opening argument and in a side bar conference directed there be no further argument; (2) interrupted defense counsel during cross-examination of plaintiff regarding the sale of plaintiff's RNB Stock to Hemet BanCorp and terminated that cross-examination pursuant to Evidence Code section 352, later relenting and allowing defendants only 30 minutes additional time to complete questioning on this "major aspect of damages"; and (3) the trial court admitted into evidence nine of ten trial exhibits challenged by defendants and later, after plaintiff's counsel complained, relented and admitted the tenth exhibit.

Defendants cite additional instances in which the trial court ruled against defendants apparently to support their view that the only plausible explanation for the trial court's numerous rulings in favor of plaintiff and against defendants is that such rulings were erroneous. We will not recount each of the remaining instances cited by defendants because we reject defendants' implication and suggest another plausible and probable explanation for the trial court's action is that defendants' assertions, below, may not have been supported by the law. In short, we need not determine whether the trial court properly ruled in each instance cited by defendants because defendants have not made the threshold showing that any of the rulings in question were erroneous. Accordingly, we reject the assertion that defendants were denied a fair trial and that the trial court, as evidenced by nothing more than the number of rulings in favor of plaintiff, was biased against defendants from the outset of the trial.

5. ATTORNEYS' FEES AWARD

The final contention we must address in this appeal is defendants' assertion that the trial court erred in granting plaintiff's motion for attorneys' fees pursuant to Code of Civil

Procedure section 1021.1. That section, as defendants acknowledge, applies only to certain counties, including Riverside, and permits the trial court to award reasonable attorneys' fees, "in an amount to be determined in the court's discretion," to the prevailing party in a civil suit "if all of the following conditions are met:

"(1) The party has made an offer for judgment under section 998.

"(2) That offer was not accepted within the time provided in Section 998.

"(3) The party to whom the offer was made failed to obtain a more favorable judgment. . . . " (Code Civ. Proc., S 1021.1, subds. (a) & (b).)

In pursuing this contention on appeal, defendants do not challenge the foregoing preconditions, thereby conceding plaintiff made the required statutory offer which defendants rejected and after which defendants did not obtain a more favorable judgment.[31] Instead, defendants argue only that they acted reasonably in rejecting plaintiff's Section 998 offer, therefore, the trial court erred in awarding attorneys' fees to plaintiff.

On the issue of reasonableness, Code of Civil Procedure section 1021.1 provides in pertinent part that, "In exercising its discretion to award attorney's fees the court shall consider the following factors:

"(1) The reasonableness or lack thereof, of a party's failure to accept an offer for judgment under Section 998 in light of the facts known to the party at the time, of [sic] which, in light of all of the circumstances, should have been

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[31] Two weeks prior to trial, plaintiff made a Code of Civil Procedure section 998 offer of $980,000.

known to the party. Reasonableness shall be determined by a consideration of at least the following matters:

"(A) The then apparent merit or lack of merit in the claim that was the subject of the action.

"(B) The closeness of the questions of fact and law at issue.

"(C) Whether the offeror has unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.

"(D) Whether the action was in the nature of a `test case,' presenting questions of far-reaching importance affecting nonparties.

"(E) The relief that might reasonably have been expected if the claimant should prevail.

" (F) The amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

"(G) Those other matters that the court may deem relevant in the interest of justice." (Code Civ. Proc., S 1021.1, subd. (c).)

In addressing this issue, defendants preface their discussion with the statement that, "Applying each of those factors to the instant case, it is evident that the award of attorney's fees to the plaintiff was totally unwarranted." Defendants' discussion, charitably characterized, focuses on only four of the seven factors set out above, and, therefore, belies that prefatory statement. Specifically, defendants argue the reasonableness of rejecting plaintiff's section 998 offer, first, because "defendants reasonably believed that their conduct which gave rise to this suit [enactment of the bylaw which removed plaintiff from the RNB board of directors] was governed by federal law" and thus presumably was lawful. In

this regard, defendants assert they adopted the bylaw after consultation with legal counsel and out of legitimate concern over plaintiff's chronic loan defaults which jeopardized "the overall welfare of an otherwise exemplary bank." Next, defendants argue that, "The enormous amount of damages awarded to plaintiff is due in large measure to his success on his fourth cause of action for [tortious] breach of the [implied] covenant of good faith and fair dealing" which defendants contend they reasonably believed did not pertain to them in light of Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654. Thirdly, defendants argue that plaintiff, despite timely discovery requests, did not provide defendants with documentation to "substantiate" plaintiff "loss of construction business," therefore plaintiff failed to provide information necessary for defendants to evaluate the reasonableness of plaintiff's offer. Finally, defendants assert "the dearth of cases dealing with the liability of banks in this context makes it a 'test case,' whose determination will have far reaching importance for nonparties."[32]

We reject each of defendants' assertions. In addressing this contention, we note, at the outset, that an award of attorneys' fees under Code of Civil Procedure section 1021.1 is directed to the discretion of the trial court and, as with all such discretionary matters, will not be reversed on appeal absent a clear showing of prejudicial abuse. (See Mission

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[32] Defendants also note under Code Or Civil Procedure section 1021.1, it is only attorneys' fees incurred from the date of plaintiff's offer to settle a month before trial which can be awarded. Although defendants, by making this assertion, imply the trial court awarded plaintiff attorneys' fees for a period greater than that authorized by statute, defendants do not demonstrate that such occurred. Moreover, even if such error occurred, it would not negate an otherwise proper attorneys' fee award but only would require reduction of that award.

Imports, Inc. v. Superior Court (1982) 31 Cal.3d 921, 932.) Defendants have not made such a showing.

On this issue defendants again fall victim to their persistent refusal to recognize that plaintiff pursued his action below under various theories of recovery, including defamation, any one of which, if valid, supports the general verdict. Consequently, while defendants reasonably may have believed their action in adopting the bylaw was lawful and otherwise legitimate, that belief does not automatically justify the conduct underlying the defamation theory. Because defendants do not attempt to demonstrate that each of plaintiff's various theories of recovery lacked merit (Code Civ. Proc., § 1021.1, subd. (c)(l)(A)) or that each such theory involved close questions of fact and law (Code Civ. Proc., § 1021.1, subd. (C)(l)(B)) defendants have failed, at least with respect to those factors, to demonstrate the trial court clearly abused its discretion in granting plaintiff's attorneys' fees motion. Moreover, defendants cannot make the required showing because we have already determined that the defamation count is a valid theory and does not involve close questions of fact and law.

Defendants' discussion of the two remaining factors purportedly relied on by defendants to support their reasonableness assertion is equally devoid of detail and as such reveals such arguments are meritless. Defendants do not expressly discuss the "documentation" or "information" plaintiff purportedly failed to produce to substantiate plaintiff's damage claim for loss of business and which defendants claim was necessary to evaluate the reasonableness of plaintiff's offer under Code of Civil Procedure section 1021.1, subdivision (c)(l)(C). Our review of the portions of the reporter's transcript cited by defendants to support this argument reveals defendants attempted to obtain documentation, including non-discoverable, privileged information such as tax returns,

regarding plaintiff's claimed loss of business by serving plaintiff with a subpoena duces tecum on the day of trial . In response to plaintiff's motion to quash that subpoena, defendants attempted to explain and presumably justify the undisputed lateness of their discovery request by pointing out that plaintiff did not provide sufficient information in responses to pertinent interrogatories propounded by defendants. According to the discussion in the record, other than the last minute subpoena duces tecum, defendants did not otherwise request document production from plaintiff during the course of pretrial discovery. In short, the portion of the record relied on by defendants does not establish plaintiff unreasonably refused to furnish information regarding his claimed business losses but instead reveals that defendants did not request such documentation in a timely manner.[33]

Finally, defendants attempt to characterize this litigation as a "test case" due to the "dearth of cases dealing with liability of banks in this contexts is equally devoid of discussion and merit. Because defendants rely on this assertion without undertaking any discussion we just assume defendants' "test case" argument pertains to defendants' assertion, previously discussed, that federally chartered banks are instrumentalities of the federal government and therefore are immune

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[33] Defendants also cite a "best evidence" objection raised by defendants during plaintiff's trial testimony regarding the value of plaintiff's construction business during the period from May 1, 1986, through April 30, 1987, to support the claims that plaintiff unreasonably withheld information necessary to evaluate plaintiff's claimed business losses. The trial court correctly overruled that objection apparently recognizing plaintiff was qualified to express an opinion regarding the value of his business and best evidence simply was not pertinent. Documents substantiating plaintiff's opinion are not foundational, as defendants apparently contend, but merely go to the weight of plaintiff's opinion. Moreover, defendants' objection does not support the inference defendants would have us draw.

from liability for punitive damages. We rejected that argument when earlier raised by defendants and do so again here.

Defendants, in our view, simply have failed to demonstrate that the trial court clearly abused its discretion in granting plaintiff's motion for attorneys' fees under Code of Civil Procedure section 1021.1. Accordingly, we conclude defendants' contention in that regard wholly is meritless.

REQUESTS FOR JUDICIAL NOTICE

During the pendency of this appeal, defendants and plaintiff requested this court to take judicial notice of various documents. We reserved ruling on each request for judicial notice for decision with the appeal and here address those requests.

Defendants fired the first shot in the judicial notice volley on December 11, 1990, by asking this court to take judicial notice, first, of the Government Accounting Office report to Congress, dated September 1990 entitled "Bank Insurance Fund -- Additional Reserves and Reforms Needed to Strengthen the Fund" and, second, of a purported "legislative analysis of Corporations Code section 303, subdivision (c)." According to defendants, judicial notice of the fact and content of both documents is permitted under Evidence Code section 452, subdivisions (c) and (h), pertaining, respectively, to official acts of the legislative, executive and judicial branches of state and federal governments and facts and propositions not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of indisputable accuracy.

Plaintiff returned fire on January 18, 1991, relying on the same subdivisions of Evidence Code section 452 cited by defendants in their request for judicial notice, by requesting this court take judicial notice of the 1989 Annual Report of Riverside National Bank.

Defendants fired the last shot on January 22, 1992, by requesting this court take judicial notice of various liens filed in Riverside County Superior Court against any judgment plaintiff might receive in the lawsuit which is the subject of this appeal. In connection with this final request for judicial notice, defendants relied on Evidence Code section 452, subdivision (d)(1) (pertaining to records of any court of this state) and subdivision (h), discussed above.

We deny each of the requests for judicial notice filed by defendants and plaintiff. In doing so, we resist the temptation to discuss in detail the frivolous nature of each request. We content ourselves with pointing out, assuming the relevance of the requests, that each request pertained to matters not presented in the trial court. In other words, each request asked this court to consider evidence purportedly pertinent to factual determinations resolved during trial. Our province does not include fact finding but instead is limited to reviewing legal issues pertaining to purported error which occurred in the lower court.

Moreover, even assuming our province extended to relitigating factual determinations resolved in the trial court, the Evidence Code sections relied on by both sides permit us to take judicial notice only of the documents in question but not their contents. In other words, we could, for example, judicially notice the fact that the GAO issued a report to Congress in September 1990 regarding the Bank Insurance Fund but we cannot take judicial notice of the content of that report. Similarly, we could take judicial notice of the fact that RNB issued an Annual Report in 1989 and the fact that various liens were filed in the trial court. Presumably, neither defendants nor plaintiff are aided by our limited ability to take judicial notice only of the existence of the documents in question but instead depend, incorrectly, on our ability to take judicial notice of the content of each such document. Accord-

ingly, and in any case, each request for judicial notice is denied.

CONCLUSION

In undertaking our review of the numerous and extensive issues raised by defendants in this appeal, we initially were struck by defendants' apparent inability to appreciate that a jury might view the various allegations of plaintiff's complaint and the evidence pertinent thereto in a manner adverse to defendants. In the trial court, defendants adhered steadfastly to the position that defendants' actions, in all respects, were proper. The jury, as evidenced by its verdict, obviously reached a different conclusion, as did the trial court, as evidenced by its denial of defendants' post-trial motions. Although defendants' trial court stance arguably could be characterized as advocacy, we do not fully comprehend defendants' adherence to that stance in this appeal. In other words, despite, what in our view, was an unequivocal message from the jury, defendants on appeal not only persist in their trial court assertions, but now also blame the trial court for their apparent lack of success.

On appeal, defendants compound the tactical error we believe they committed in the trial court by not only effectively requesting this court to relitigate the entire dispute, but also, as the foregoing discussion reveals, perhaps ad nauseam, by failing to demonstrate error cognizable on appeal occurred in the trial court. The one possible error arguably most detrimental to defendants is one about which defendants did not complain, specifically, the form of the general verdict with special interrogatories. Defendants, as previously noted, acquiesced both to the form and use of the general verdict with special interrogatories and therefore may not now complain on appeal. As we have discussed, the general verdicts on liability and damages eliminated the need for us to address many of defendants' attacks on plaintiff's theories of

recovery. That, combined with defendants' failure to demonstrate other cognizable error, requires us to affirm the judgment.

DISPOSITION

The judgment is affirmed in its entirety. Plaintiff to recover his costs on appeal.

NOT FOR PUBLICATION.

McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ McDaniel
J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

RECEIVED
JUN 16 1992

APPENDIX D

Fourth Appellate District, Division Two, No. E006746

SO27895

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

NICHOLAS E. TAVAGLIONE, Respondent

v.

MICHAEL C. BILLINGS, Et Al., Appellants

SUPREME COURT
FILED
MAR - 3 1994
Robert Wandruff Clerk
R. CRUZ
DEPUTY

Appellants' petition for review DENIED.

LUCAS

Chief Justice

APPENDIX E

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division Two

FILED
DEC 10 1993
COURT OF APPEAL FOURTH DISTRICT

TAVAGLIONE, NICHOLAS E.
PLAINTIFF-RESPONDENT

v.

BILLINGS, MICHAEL C., ET AL.
DEFENDANT-APPELLANT

ORDER

E006746
Riverside County No. 187341

THE COURT:

The petition for rehearing is DENIED.

McKINSTER

Acting Presiding Justice

cc: Riverside County Superior Court Clerk
All Counsel

COPY

APPENDIX F

FILED
RIVERSIDE COUNTY
MAR 10 1989
WILLIAM E. GONSALVES, Clerk
by J. Pearson, Deputy

MILLER, BOYKO and BELL
A Professional Corporation
550 West "B" Street, Suite 400
SAN DIEGO, CALIFORNIA 92101-3599
(619) 235-4040

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

NICHOLAS E. TAVAGLIONE, Plaintiff, vs. MICHAEL C. BILLINGS; DOLORES MAGNUSON; MARYANN ARCHAMBAULT; LEON SIGERMAN; J. RICHARD SWARTZ; ROY E. WHITEHEAD; RIVERSIDE NATIONAL BANK; and DOES 1 through 100, inclusive, Defendants.	CASE NO. 187341 JUDGMENT UPON GENERAL VERDICT WITH SPECIAL INTERROGATORIES AND SPECIAL VERDICT TRIAL DATE: January 17, 1989

This cause came on regularly for trial by jury on January 17, 1989, in Department A of the Superior Court of California for the County of Riverside, Indio Branch, the Honorable John P. Carroll, Judge, presiding. Plaintiff appeared by his attorneys Roy Morrow Bell, Esq., and Fletcher W. Paddison, Esq., of the law firm of Miller, Boyko and Bell, and defendants appeared by their attorneys Timothy M. Thornton, Esq., and Jeff E. Scott, Esq., of the law firm of Manatt, Phelps, Rothenberg and Phillips.

A jury of twelve (12) persons was regularly impaneled and sworn to try the action. Witnesses on the part of both plaintiff and defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider their verdict and the special interrogatories submitted to them, and subsequently returned a verdict which is set forth below. Thereafter, the jury retired to consider the special verdict for the award of punitive damages which is set forth below.

WHEREFORE, by virtue of the law and by reason of the general verdict with special interrogatories and the special verdict, it is hereby ordered, adjudged and decreed that plaintiff, Nicholas E. Tavaglione, shall recover damages against defendants as follows:

1. From defendant Riverside National Bank the sum of Two Million Two Hundred Fifty-Four Thousand Seven Hundred and Eighty-Seven Dollars ($2,254,787.00) in compensatory damages and Two Million Three Hundred Thousand Dollars ($2,300,000.00) in punitive damages, for a total judgment of Four Million Five Hundred Fifty-Four Thousand Seven Hundred and Eighty-Seven Dollars ($4,554,787.00) against Riverside National Bank.

2. From defendant Michael C. Billings the sum of Two Million Two Hundred Fifty-Four Thousand Seven Hundred and Eighty-Seven Dollars ($2,254,787.00) in compensatory damages and One Hundred Thirty Thousand Dollars ($130,000.00) in punitive damages, for a total judgment of Two Million Three Hundred Eighty-Four Thousand Seven Hundred and Eighty-Seven Dollars ($2,384,787.00) against Michael C. Billings.

3. From defendant J. Richard Swartz the sum of One Dollar ($1.00).

4. From defendant Maryann Archambault the sum of one Dollar ($1.00).

5. From defendant Roy E. Whitehead the sum of One Dollar ($1.00).

WITNESS the Honorable John P. Carroll, Judge of the Superior Court of the State of California for the County of Riverside, Indio Branch, and my hand and seal of this Court this day of March, 1989.

J. Porres

CLERK OF THE SUPERIOR COURT

MAR 10 1989

Entered on date filed
INDIO
Judgement Book 42 Page 248

JUDGMENT UPON GENERAL VERDICT
AND SPECIAL VERDICT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE		FOR COURT USE ONLY
TITLE OF CASE (abbreviated) NICHOLAS E. TAVAGLIONE v. MICHAEL C. BILLINGS, ET AL.		
ATTORNEY(S) NAME AND ADDRESS MILLER, BOYKO AND BELL 550 West "B" street, Suite 400 San Diego, CA 92101-3599	TELEPHONE (619) 235-4040	
ATTORNEY(S) FOR: Plaintiff	HEARING DATE-TIME-DEPT	CASE NUMBER 187341

DECLARATION OF SERVICE BY MAIL

I, DEBORAH L. TRELOAR declare: That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred.

My San Diego address is 550 West "B" Street, Suite 400, San Diego, CA 92101-3559. I served the following document(s) JUDGEMENT UPON GENERAL VERDICT WITH SPECIAL INTERROGATORIES AND SPECIAL VERDICT by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

TIMOTHY M. THORTON, ESQ. VIA FEDERAL EXPRESS
JEFF E. SCOTT, ESQ.
MANATT, PHELPS, ROTHENBERG & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego California, on March 8 19 89.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 8 19 89.

Deborah L. Treloar
(Signature)

PROOF OF SERVICE BY MAIL

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE INDIO BRANCH		FOR COURT USE ONLY
TITLE OF CASE (abbreviated) NICHOLAS E. TAVAGLIONE v. MICHAEL C. BILLINGS, ET AL.		
ATTORNEY(S) NAME AND ADDRESS MILLER, BOYKO AND BELL 550 West "B" street, Suite 400 San Diego, CA 92101-3599	TELEHPONE (619) 235-4040	
ATTORNEY(S) FOR: Plaintiff	HEARING DATE-TIME-DEPT	CASE NUMBER 187341 (transferred from Riverside)

DECLARATION OF SERVICE BY MAIL

I, DEBORAH L. TRELOAR declare: That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed (Residing/Employed) in the County of San Diego, California, within which county the subject mailing occurred.

My Business address is 550 West "B" Street, Suite 400, San Diego, CA 92101-3559. I served the following document(s) JUDGEMENT UPON GENERAL VERDICT WITH SPECIAL INTERROGATORIES AND SPECIAL VERDICT (conformed copy) by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

JEFF E. SCOTT, ESQ.
TIMOTHY M. THORTON, ESQ.
MANATT, PHELPS, ROTHENBERG & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at San Diego California, on March 13 19 89.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 13, 19 89.

Deborah L. Treloar
(Signature)

PROOF OF SERVICE BY MAIL

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on April 15, 1994, I served the within *Appendix to Petition For Writ of Certiorari (Volume 2 of 3)* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and 40 Copies*)

Clerk, California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

Clerk of the Superior Court
for the County of Riverside
Honorable John P. Carroll, Judge
County Courthouse
4050 Main Street
Riverside, California 92501

Clerk of the Superior Court
for the County of Riverside
Indio Branch
Honorable H. Morgan Dougherty, Judge
Department C
46-209 Oasis Street
Indio, California 92201

Mr. Roy Morrow Bell
Mr. Fletcher W. Paddison
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599
Attorneys for Plaintiff,
Mr. Nicholas E. Tavaglione

Superior Court Clerk
Riverside County
Post Office Box 431 -- Appeals
Riverside, California 92502

Mr. Raymond Pepper
Miller, Boyko and Bell
550 West "B" Street, Suite 400
San Diego, California 92101-3599

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1994, Los Angeles, California.

Betty J. Malloy
(Original Signed)